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ORIGINALISM, ILLEGAL IMMIGRATION, AND THE CITIZENSHIP CLAUSE

Andrew T. Hyman*

ABSTRACT

The Citizenship Clause of the Fourteenth Amendment confers birthright citizenship in cases of lawfully domiciled aliens, but not in cases of illegal immigration or legal visitation by aliens. The best reading of the original understanding in the 1860s is that the Clause impliedly requires parental domicile in the United States, domicile in turn requires some degree of allegiance, but parents who have not been received into the U.S. cannot pay any allegiance, so these requirements can only be reconciled by domicile de jure — that is, the domicile must be legal. This dichotomy between de jure and de facto domicile was well-known in the 1860s. In cases of illegal immigration, citizenship for U.S.-born children should be sought via naturalization, and the same in cases of legal visits by temporary foreign visitors. Intertwined with birthright citizenship is the Clause’s guarantee of state citizenship, and scholars who say that Washington D.C. is out of compliance are correct, because the federal government has failed to ensure state citizenship there.

KEYWORDS

citizenship, immigration, 14th amendment, birthright, domicile

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I. INTRODUCTION

There is presently a controversy about whether U.S.-born children of unlicensed immigrants¹ are entitled to birthright United States citizenship under the Fourteenth Amendment to the Constitution, which was ratified shortly after the Civil War, in 1868.² In tandem with that is a similar controversy: whether temporary foreign visitors can claim constitutional birthright citizenship for their children born during the visit.

Both controversies are addressed in an executive order issued in January 2025 by President Donald Trump.³ The relevant portion of the Fourteenth Amendment is its first clause, which is the Citizenship Clause:⁴

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

This article will focus mainly on two specific aspects of this legal controversy: first, whether the Citizenship Clause has an implied domicile requirement (yes), and second, whether that domicile requirement can be satisfied by unlicensed immigrants (no) or by temporary foreign visitors (no). Domicile generally means a permanent residence accompanied with intent to remain there, which is a mostly factual matter, but under certain circumstances that residence must be limited to lawful residence only. Keeping the scope of this article primarily focused upon this pair of aspects will allow them to be more fully addressed.⁵

¹ I use the term “unlicensed immigrants” instead of “illegal aliens” because the latter has been criticized for suggesting that the people themselves are illegal. In 2015, the Associated Press made this recommendation: “Except in direct quotations, do not use the terms *illegal alien*, *an illegal*, *illegals*, or *undocumented*.” Nicole Meir, “*Illegal Immigrant*” No More, ASSOCIATED PRESS, August 3, 2015 (original emphasis). The term “undocumented” is indeed euphemistic. The idea of a “license” to enter the U.S. is very old. See note 51 *infra* and accompanying text.

² U.S. CONST. amend. XIV.

³ Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

⁴ U.S. CONST. amend. XIV, §1, cl. 1. The Citizenship Clause was written as an amendment to Section 1 of the joint resolution that had already passed in the House. It was proposed by Sen. Jacob Howard, except for the words “or naturalized” which were added later. See CONG. GLOBE, 39th Cong. 1st Sess. 2890 (1866) (remarks of Sen. Howard).

⁵ For example, this article will not take any position about whether the existence of an alien “invasion” affects the operation of the Citizenship Clause. See generally Zachary Wolf, *Why the US has birthright citizenship and how Trump could challenge it*, CNN, December 10, 2024 (quoting Judge James Ho as saying, “No one to my knowledge has ever argued that the children of invading aliens are entitled to birthright citizenship.”); see generally Robert Natelson & Andrew Hyman, *The Constitution, Invasion, Immigration, and the War Powers of States*, 13 BR. J. AM. LEG. STUDIES 1 (2024). Nor will this article address the theory that the Citizenship Clause requires 100% exclusive allegiance to the U.S., which would be contrary to the holding in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); Professor Ramsey rebuts that theory, and I would not bet on Professor Ramsey being wrong. See Michael Ramsey, *Originalism and Birthright Citizenship*, 109 GEORGETOWN LAW JOURNAL 405, 451-54 (2020). Another issue that will not be discussed here is the legal fiction that any immigrant can be considered not

The emphasis here is on the original meaning of the Constitution, and anything after 1868 is much less persuasive, because the original meaning is clear. Therefore, this article will not say much about the holding in the leading case on this subject, *United States v. Wong Kim Ark* (1898),⁶ except to mention that the parents in that case unequivocally immigrated legally; the majority opinion in that case used the word “domicile” 24 times, and there was no doubt the parents were domiciled in the U.S. when the child was born in California, even though they had a limited local allegiance to the United States rather than exclusive allegiance.⁷ The Citizenship Clause does not require exclusive allegiance, or at least this author is not aware of evidence on that score sufficient to overcome the stare decisis effect of *Wong Kim Ark*.

To be clear, the law before and during the 1860s was that domicile (often spelled “domicil” in older sources) required some degree of allegiance, either full or merely local. Additionally, non-domiciled parents such as foreign tourists traveling lawfully in the U.S. could owe local allegiance, even though it was “but momentary and uncertain,” as Sir Edward Coke put it; the tourist’s U.S.-born children would receive birthright citizenship, unless domicile was required too, and the status of the parents mattered in determining domicile.⁸ In contrast, people who entered the U.S. without implied or express consent of the sovereign could not pay any allegiance unless subsequently received into the U.S.⁹

to be technically “in” the U.S.; a law review article in 2012 said the “born...in” issue is “as contentious as the definition of ‘jurisdiction.’” Allison Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57, 68 (2012).

⁶ *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (“Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States”).

⁷ John Eastman, *The Significance of “Domicile” in Wong Kim Ark*, 22 CHAP. L. REV. 301 (2019).

⁸ *Calvin’s Case* (1608), 77 Eng. Rep. 377, 384; 7 Co. Rep. 1, 6b (K.B.). Here is some context for that quote of Sir Edward Coke:

Concerning the local obedience it is observable, that as there is a local protection on the King’s part, so there is a . . . local ligeance of the subject’s part. . . . [L]ocal obedience being but momentary and uncertain, is yet strong enough to make a natural subject, for if he hath issue here, that issue is . . . a natural born subject. . . . [I]t is . . . neither the climate nor the soil, but *ligeantia* and *obedientia* that make the subject born

Id. (original emphasis). The word “ligeance” meant allegiance, and Coke wrote that “ligeance” was sometimes used synonymously with “obedience” or “obeisance.” *Id.* at 4b. It appears from that last blockquoted sentence that Coke was not enthusiastic about a pure system of *jus soli*, which is Latin for “right of the soil.” Coke also wrote that the status of the parents mattered, for determining the status of the newborn child. *Id.* at 18b (“the parents be under the actual obedience of the King”).

⁹ See TIMOTHY CUNNINGHAM, 1 A NEW AND COMPLETE LAW DICTIONARY (3d ed. 1783) (definition of “estate”) (“Every person . . . cannot pay any allegiance to any other Society, unless he be afterwards received into it”). See also note 47 *infra* and accompanying text (Matthew Bacon on allegiance). The inability of a person to pay allegiance after immigrating unlawfully was already well-established by English law before the United States gained independence. See, e.g., Natelson & Hyman, *supra* note 5, at 29 n.182

Part II of this article will prove that the Citizenship Clause includes an implied requirement of domicile, which is acknowledged even by scholars who have argued that unlicensed immigrants satisfy that domicile requirement.¹⁰ This requirement of domicile excludes foreign visitors from claiming a constitutional right to U.S. citizenship for their U.S.-born child. Part III will describe features of domicile law as of the 1860s that are pertinent to the Citizenship Clause's application to illegal immigration, and will show that unlicensed immigrants do not qualify as being domiciled under the Clause. Part IV argues that the Clause, and its domicile requirement, do not apply to any U.S. territories, regardless of whether a territory has been deemed "incorporated," but do apply in the District of Columbia. Part V discusses a piece of *Wong Kim Ark* apart from its holding, specifically its use of French law and history to interpret the Citizenship Clause. Part VI draws conclusions from Parts II through V. Illegal immigration was not a significant issue in the 1860s, but the original meaning of the Citizenship Clause is clear as applied to that subject, just as the meaning of the First Amendment is clear as applied to communication via telegraph, telephone, radio, television, and the internet.

II. THE CITIZENSHIP CLAUSE INCLUDES AN IMPLIED DOMICILE REQUIREMENT

The text of the Citizenship Clause is paramount. Two separate pieces of that clause independently imply a domicile requirement: the clause's use of the word "jurisdiction" does so, and then the state citizenship subclause does so again.

As to the jurisdiction requirement, it was well-known before and during the Civil War era that full and complete jurisdiction often required domicile.¹¹ In 1830,

and accompanying text.

¹⁰ Justin Lollman, Note, *The Significance of Parental Domicile Under the Citizenship Clause*, 101 VA. L. REV. 455 (2015). Lollman takes a middle ground, by arguing that the U.S.-born child of temporary foreign visitors *is not* covered by the Citizenship Clause, whereas the U.S.-born child of unlicensed immigrants *is* covered by the Citizenship Clause. He is correct about the former because temporary visitors have no U.S. domicile. Cf. Kurt Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, NOTRE DAME L. REV. (forthcoming 2025) (manuscript at 92), https://papers.darn.com/sol3/papers.cfm?abstract_id=5140319. Lash concludes that, "Any child born in the United States to a family that legally entered the United States to take up a permanent domicile here is presumptively a citizen of the United States." *Id.*

¹¹ See JOHN TRAYNER, LATIN PHRASES AND MAXIMS 295-96 (1861) ("Domicile is the basis on which civil jurisdiction is most frequently founded; it subjects the person to the jurisdiction of the judge in whose territory he resides...."). See also 11 ENCYCLOPÆDIA BRITANNICA 625 (6th ed. 1823) ("where a stranger, not a native of Scotland, has only a moveable estate in this kingdom, he is deemed to be so little subject to the jurisdiction of its courts, that action cannot be brought against him till his effects be first attached...."). The person who proposed the Citizenship Clause was Senator Jacob Howard, and he said this: "I concur entirely with the honorable Senator from Illinois [Trumbull], in holding that the word 'jurisdiction,' as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States." CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866).

Joseph Story wrote the following about that requirement:¹²

The question of domicil is of very great importance, for it often regulates political and civil rights, and founds or destroys jurisdiction over the person or property. Thus, for instance, there is what is called a *political domicil*, which is that place where a party must exercise his political rights, duties and privileges, as his right to vote, his duty to pay taxes, etc. Then there is what is called a *civil domicil*, or that place where he has fixed his habitual home or residence, which decides upon his civil rights, and power to acquire, alienate, and dispose of property, to contract marriage, etc. Then, again, there is, or may be, a *forensic domicil* (*forum domicilii*), or place where he is to sue or be sued, and to be subjected to the exercise of the jurisdiction of judicial courts. It may, and it often does happen, that the political, civil and forensic domicil is the same....

James Kent made a similar point, writing that the “place of domicil of the defendant, commonly called the *forum domicilii*,” is a “place[] of jurisdiction.”¹³ Thus, if a person’s principal domicile is not in the United States, then the United States cannot have full and complete jurisdiction over that person.

It is true that some unlicensed immigrants have been charged and convicted of various crimes unrelated to their immigration status, and some scholars might infer adequate jurisdiction from that fact. However, that alone is not indicative of a full and complete jurisdiction.

The executive branch has had authority on tribal reservations to prosecute major crimes ever since 1885, and even before then the United States had latent power to make that happen. Yet, no one disputes that the U.S. lacked full and complete jurisdiction over those areas at least up until 1885, within the meaning of the Fourteenth Amendment.¹⁴ The lack of full and complete federal jurisdiction

¹² *Domicil*, in 4 ENCYCLOPEDIA AMERICANA 613-16 (Francis Lieber ed., 1st ed. 1830) reprinted in John Hogan, *Joseph Story’s Essay on Domicil*, 35 B.U.L. REV. 215, 219 (1955) (original emphasis). That encyclopedia was successful, sold thousands of copies, and Story requested that the editor delay attribution of his essay on domicile until after initial publication. LEWIS HARLEY, FRANCIS LIEBER: HIS LIFE AND POLITICAL PHILOSOPHY 57 (1899). Professor Ramsey has stressed the importance of distinguishing “full and complete” jurisdiction (which the framers intended) from exclusive jurisdiction (which they did not). See Ramsey, *supra* note 5, at 450 n.216. Thus, the word “jurisdiction” in the Citizenship Clause must be broad enough to encompass the function described here by Story.

¹³ JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 462-63. (3rd ed. 1836) (original emphasis). See also Joseph Story, *Conflict of Laws*, 11 AM. JURIST & L. MAG. 365, 405-06 (1834). Like Kent, Story described *forum domicilii* as simply the domicile of a defendant. *Id.*

¹⁴ The Major Crimes Act of 1885 gives jurisdiction to the federal government over crimes on tribal lands including murder, rape, arson, and burglary, while the tribes have retained concurrent jurisdiction. See 18 U.S.C. § 1153. Congress also has power to abrogate sovereign immunity of tribal reservations. See generally *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 593 U.S. 382 (2023). See also Ramsey *supra* note 5, at 443. Referring to passage of the Major Crimes Act in 1885, Professor Wildenthal says, “It seems difficult to dispute that, at least from that time on, Indians have been ‘subject to the jurisdiction’ of the United States.” BRYAN WILDENTHAL,

on reservations was the main reason for the exclusion of tribal members from constitutional birthright citizenship.¹⁵ Likewise, the amenability of unlicensed immigrants to prosecution for crimes is insufficient to imply the sort of jurisdiction that is mentioned in the Citizenship Clause, because a U.S. domicile is necessary too, for the reasons described by Story and Kent.

Now consider the other way in which the Clause's text implies a domicile requirement. The last seven words of the Clause say, "and of the state wherein they reside." The last word "reside" refers to domicile, as is evident from the word "state" being singular; a person can have only one principal domicile at a time, but potentially can own a plural number of abodes. This singularity was no accident of spelling; when the Senate's printer incorrectly used the plural form, Senator Jacob Howard of Michigan insisted upon a correction: "The word 'state' in the eleventh line is printed 'states.' It should be in the singular instead of the plural..."¹⁶

Howard had introduced the Fourteenth Amendment in the Senate, and subsequently drafted the Citizenship Clause (as an amendment to the proposed constitutional amendment).¹⁷ He presumably knew whereof he spoke.

The Clause is a package deal of federal and state citizenship, and none of the framers asserted that a state-born person (or anyone else) could be constitutionally entitled only to U.S. citizenship without state citizenship at the time of birth. Thus, the domicile requirement of the last seven words applies to the whole Clause as of the time of birth. Horace Maynard was a Congressman from Tennessee, an abolitionist and union supporter who put the matter this way while the Fourteenth Amendment was pending: "Under our system of government state citizenship is inseparable from national citizenship."¹⁸ That is what the text itself says.

The Clause's domicile requirement, which is doubly evident from the text, was also verified by Senator Lyman Trumbull of Illinois, who chaired the Senate

NATIVE AMERICAN SOVEREIGNTY ON TRIAL 29 (2003). In any event, the Citizenship Clause could only apply to tribal reservations located within states rather than federal territories, because the Clause specifically refers to "the state" wherein they reside.

¹⁵ In 1924, the remaining exclusions of the tribes from citizenship were abolished. *See* Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. §1401(b)). As to the power under which the 1924 statute was enacted, *see generally* *Boyd v. Nebraska*, 143 U.S. 135, 162 (1892) (affirming the constitutionality of "collective naturalization"); *Contzen v. United States*, 179 U.S. 191, 193 (1900) (same); CHARLES MARTIN AND WILLIAM GEORGE, *AMERICAN GOVERNMENT AND CITIZENSHIP* 382 (1927).

¹⁶ CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866) (remarks of Sen. Howard). Sen. Reverdy Johnson suggested leaving it alone, but Sen. Howard insisted. *Id.* American lawyers in that era defined residence as domicile, and recognized that any further residence of a person would not be his primary domicile. JOHN BOUVIER, 2 *A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION; WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW* 468 (1856).

¹⁷ *See* note 4 *supra*.

¹⁸ CONG. GLOBE, 40th Cong., 2nd Sess. 159 (1867) (remarks of Rep. Maynard). Regarding the defeated southern rebels, Maynard said there were only two choices: "either readmit them to a participation in the State and General Government or not, at our discretion." *Id.* *See generally* Donald Weckstein, *Citizenship for Purposes of Diversity Jurisdiction*, 26 Sw. L. J. 360, 369-71 (1972) (discussing whether a person who leaves his state is stateless until he establishes domicile in a new one).

Judiciary Committee from 1861 to 1873. One of the purposes of the Citizenship Clause was to entrench or legitimize aspects of a similar clause that had already been enacted by the Civil Rights Act of 1866 (hereinafter “CRA”),¹⁹ and that clause in the CRA was written by Trumbull: “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”²⁰ Trumbull explained to President Andrew Johnson: “The Bill declares ‘all persons’ born of parents ... domiciled in the United States, except untaxed Indians, to be citizens of the United States.”²¹ So, the 39th Congress explicitly had in mind parental domicile as a requirement for birthright U.S. citizenship.

Senator Trumbull was not the first member of Congress to explicitly link birthright citizenship with a domicile requirement. Congressman John Bingham of Ohio authored the Privileges or Immunities Clause of the Fourteenth Amendment, before the Citizenship Clause was written. Like the Citizenship Clause authored by Sen. Howard, the Privileges or Immunities Clause written by Bingham addresses U.S. citizenship: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” Bingham had already gone on record as early as 1857 about the meaning of U.S. citizenship: “All free persons born and *domiciled* within the jurisdiction of the United States, are citizens of the United States from birth....”²²

Given the explicit confirmation of the domicile requirement for birthright U.S. citizenship (by Trumbull and Bingham), plus the double implication of domicile in the text itself (in the words “jurisdiction” and the phrase “state wherein they reside”), there can be little doubt that such a domicile requirement exists in the Citizenship Clause.

¹⁹ Civil Rights Act of 1866, §1, Pub. L. No. 39-31, 14 Stat. 27. Another relevant federal statute of that era was the Expatriation Act of 1868 which protected people from action by their nation of origin, after being naturalized by the United States. *See generally* Expatriation Act of 1868, Pub. L. No. 40-249, 15 Stat. 223. The right to voluntarily expatriate from the U.S. is codified at 8 U.S.C. § 1481(a)(5). A person who expatriates from a foreign country may become stateless, which potentially complicates deportation from the U.S., and can also disincentivize expatriation. Though a migrant may expatriate from his country of origin, and thereby decrease or eliminate allegiance to it, the country of origin might not look kindly upon the rupture.

²⁰ *See* CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Trumbull).

²¹ Letter from Sen. Lyman Trumbull to President Andrew Johnson (undated), *in* Andrew Johnson Papers, Reel 45, Manuscript Div., Library of Congress, Washington D.C., www.tifis.org/Trumbull.pdf (last visited January 12, 2025). This letter from Trumbull to Johnson was probably written in February or March of 1866, before Johnson unsuccessfully vetoed the Civil Rights Bill. *See* Mark Shawhan, *The Significance of Domicile in Lyman Trumbull’s Conception of Citizenship*, 119 YALE LAW J. 1351, 1352 n.7 (2010). Trumbull was well aware that the domicile requirement of the Fourteenth Amendment marked a departure from old English law. *See* Lollman, *supra* note 10, at 472-73. Of course, the handwritten letter from Trumbull to Johnson is more indicative of original intent than original public meaning.

²² CONG. GLOBE, 35th Cong., 2nd Sess. 983 (1859) (statement of Rep. Bingham) (emphasis added). This statement by Bingham was well-publicized. *See, e.g.,* *Washington D.C., Admission of Oregon, Speech of Hon. John A. Bingham*, THE NATIONAL ERA, March 3, 1859.

The domicile requirement should be no surprise, because the courts had already pointed that way.²³ In the *Dred Scott* case (an aspect of which the Citizenship Clause overturned), Justice John McLean’s dissent discussed the word “citizen” in federal law:²⁴

It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the federal courts, and so may any individual who has a permanent *domicil* in the state under whose laws his rights are protected, and to which he owes allegiance.

This statement by Justice McLean was well-grounded in precedent.²⁵

To analyze birthright citizenship according to the Citizenship Clause, without analyzing the issue of domicile, is inadvisable, because it was the dominant doctrine of citizenship in the United States when the Fourteenth Amendment was drafted and ratified. Senator Howard, the lead author of the Citizenship Clause, explained that the Clause would perpetuate rather than overturn the dominant doctrine:²⁶

This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.

For the reasons described, the word “jurisdiction” certainly implies the domicile requirement. But even if that interpretation were uncertain, the state citizenship subclause implies the same thing, thus constraining the word “jurisdiction” by implication. That was the original understanding expressed by members of Congress at the time.

²³ Cf. *Lynch v. Clarke*, 1 Sand. Ch. 583, 648, 665–68 (N.Y. Ch. 1844) (“all persons born within the ligeance of the crown of England, were natural born subjects, without reference to the status or condition of their parents....”). The *Lynch* case involved a U.S.-born child of a temporary foreign visitor; as Professor Ramsey says, “despite the holding in *Lynch*, it seems fair to say that the issue of temporary visitors remained somewhat unsettled in the mid-nineteenth century.” Ramsey, *supra* note 5, at 416 n.43. Moreover, Ramsey says that New York case law in the 1860s was in “considerable tension with *Lynch*.” Ramsey, *supra* note 5, at 415 n.39. Agreed on both counts.

²⁴ *Dred Scott v. Sandford*, 60 U.S. 393, 531 (1857) (McLean, J., dissenting) (emphasis added). By an “elector” he meant a voter. By “the act” he meant “the act of Congress authorizing him to sue in the Circuit Court.” *Id.*

²⁵ See *Case v. Clarke*, 5 Fed. Cas. 254 (C.C.R.I. 1828) (Justice Story on circuit) “To constitute a person a citizen of a state, so as to sue in the courts of the United States, he must have a domicil in such state [A] mere temporary change of place, without any intention of permanent residence, constitutes no change of domicil”; *Brown v. Keene*, 33 U.S. 112, 115 (1834) (“A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicile....”).

²⁶ CONG. GLOBE, 39th Cong. 1st Sess. 2890 (1866) (remarks of Sen. Howard).

III. APPLYING PRE-1869 DOMICILE LAW TO CURRENT ILLEGAL IMMIGRATION

The domicile requirement established in Section II clearly excludes foreigners who are briefly visiting the U.S. in a lawful manner. The issue becomes more complicated for unlicensed immigrants, but the result is the same. Generally speaking, in the mid-1860s, it had long been the law that an infant's domicile was the domicile of the infant's parents; so, under that rule, if the parents have no U.S. domicile despite presence in the United States, then the infant's domicile is not in the U.S. either.²⁷ Looking through a modern lens, that rule makes some sense in terms of family cohesion, in terms of sending unmixed messages to would-be immigrants, and in terms of prioritizing aspiring legal immigrants over unlicensed immigrants, although the rule also could be unfair to a child who grows up in the U.S. lacking citizenship through no fault of his own. For better or worse, this rule of domicile was part of the background law in the 1860s when the Fourteenth Amendment was written. But naturalization has been available as well, since 1789, to virtually whatever extent Congress wishes.

To understand why unlicensed immigrants cannot achieve U.S. domicile, consider the principles of domicile prevalent in the 1860s. Robert Phillimore wrote a treatise on international law published in 1861, and he defined domicile in the following excerpt:²⁸

Perhaps...the American Judges have been the most successful in their attempts, and from a combination of their dicta upon different occasions, we may arrive at a tolerably accurate definition in designating it "*residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.*" Domicil answers very much to the common meaning of our word "home;" and, where a person possessed two residences, the phrase, "he made the latter his home," would point out that to be his Domicil.

The word "presumptive" in the definition italicized above is important, because it is sometimes difficult to prove that an intent to maintain a residence is genuine or firm. The longer a person stays at a residence, the stronger is the presumption that they intended to remain there permanently. As to the duration of time needed

²⁷ See, e.g., *Guier v. O'Daniel*, 1 Binn. 349 (Pa. 1806) ("A minor during pupillage cannot acquire a domicil of his own. His domicil, therefore, follows that of his father...."); *School Directors v. James*, 2 Watts & Serg. 568, 570 (Pa. 1841) ("The domicil of an infant is the domicil of the father, during the father's lifetime, or of the mother during her widowhood, but not after her subsequent marriage: the domicil of her widowhood continuing in that event to be the domicil of her child"). See also note 8 *supra* (Lord Coke saying parental status matters for becoming a subject at birth); note 21 *supra* and accompanying text (Sen. Trumbull saying parental status matters); note 38 *infra* (further discussing *School Directors v. James*); note 48 *infra* (New York's top court saying parental status matters).

²⁸ ROBERT PHILLIMORE, 4 COMMENTARIES UPON INTERNATIONAL LAW 43 (1861) (emphasis added, citations omitted). As to Phillimore's reputation, see note 75 *infra* and accompanying text.

to establish domicile, many Roman jurists in ancient times held that ten years of residence was needed before domicile could be established, but if sufficient intent could be proved then even a few days of residence sometimes could suffice.²⁹

If a person has entered the United States unlawfully, then it would be difficult to presume that domicile has been established earlier than several years after entry.³⁰ By analogy, even legal immigrants are required to wait five years before becoming eligible for naturalization.³¹ In any event, as we shall see, any U.S. domicile is inconsistent with illegal immigration, so a time delay is unnecessary, unless and until those migrants are received into the United States.

It is true that crossing a U.S. border unlawfully can be a dangerous, difficult, and costly endeavor that indicates serious determination. But, a significant part of the danger and difficulty is the substantial risk of apprehension and deportation. Whether an unlicensed immigrant really has the skills to continually thwart law enforcement, while remaining at a fixed residence, will typically not become clear to that unlicensed immigrant for several years.

It is useful to keep in mind that the Citizenship Clause impliedly refers not merely to domicile but to *principal* domicile. As Phillimore explained, “a man can have but one principal domicil, yet a man may have two or more domicils... for different purposes.”³² The Citizenship Clause refers to principal domicile, as it limits the number of residences to only one.³³ Phillimore explains that people often fall into the trap of confusing the principal domicile with other specific types of domicile:³⁴

It might, perhaps, have been more correct to have limited the use of the term Domicil to that which was the *principal domicil*, and to have designated simply as *residences* the other kinds of domicil; but a contrary practice has prevailed, and the neglect...to distinguish between the different subjects to which the Law of Domicil is applicable, has been the chief source of the errors which have occasionally prevailed on this subject.

Some general principles of domicile may be useful in this discussion. One such principle, endorsed by jurists of Great Britain and America, was “that the former Domicil is not abandoned until a new one has been intentionally and actually (*animo et facto*) acquired.”³⁵ A related principle is that, “The original Domicil, and

²⁹ *Id.* at 185, 191, 192. It appears that acquisition of domicil after ten years was not retroactive. *See id.* at 90 (“after the lapse of that time, a domicil would be acquired”); *id.* at 185 (“lapse of time was held to have effected a tacit abandonment of a former domicil”).

³⁰ As to the validity of federal immigration statutes, *see generally* Robert Natelson, *The Power to Restrict Immigration and the Original Meaning of the Constitution’s Define and Punish Clause*, 11 Br. J. Am. Leg. Studies (2022).

³¹ CONG. RSCH. SERV., R43366, U.S. NATURALIZATION POLICY 1 (April 2024).

³² *Id.* at 46.

³³ *See* note 16 *supra* and accompanying text (the last occurrence of the word “state” in the Clause is singular instead of plural).

³⁴ PHILLIMORE, *supra* note 28, at 48 (original emphasis). *Cf.* Weckstein, *supra* note 18 (citing cases about whether this principle of national domicile applies to domicile within U.S. states).

³⁵ PHILLIMORE, *supra* note 28, at 53.

the native character easily revert,” so a vagabond who supposedly has no domicile will likely be assigned the domicile at the time of birth, and children of unknown parents will likely be assigned the domicile where they are located.³⁶ If a child was born to parents who were temporarily travelling, or otherwise temporarily absent from their domicile, then the parental domicile would become the domicile of the child as well, instead of the child’s domicile being his place of birth.³⁷ All jurists agreed that a minor cannot change his domicile of his own accord, but “such change may be effected by the parents or guardians of the minor...[though] they differ as to the exception from and limitations of it.”³⁸ Any student, minor or not, who stayed at a place for school did not acquire domicile there.³⁹

For present purposes, the following question posed by Phillimore is of importance, as to whether governments can withhold permission to establish domicile:⁴⁰

Where the Government of a country prescribes a certain form, whereby a stranger shall be admitted to establish his Domicil therein, and to enjoy all the civil rights of a native subject, can a stranger, without the permission of Government, acquire a domicil in such country?

If so, then the stranger can obtain a domicile *de facto* according to Phillimore, but otherwise it must be domicile *de jure*, and he said that this remained a “vexed and difficult question.”⁴¹ If the question is answered affirmatively, then an unlicensed immigrant can likely establish domicile in the U.S. (after several years⁴²), and thus have a child who becomes a U.S. citizen at birth via the Citizenship Clause.

The question posed by Phillimore (blockquoted above) is somewhat ironic, because Phillimore had already written that many errors arise by failing to distinguish primary domicile from some other type of domicile.⁴³ Yet here we have two types of domicile (*de facto* and *de jure*), with Phillimore hesitating to say which one is principal. The best answer is that it depends. In the context of

³⁶ *Id.* at 54-56. If all that is known about the parents is their nationality, then arguably the domicile assigned to the children should conform to that nationality, for example when unaccompanied minors are encountered near an international border.

³⁷ *Id.* at 57.

³⁸ *Id.* at 73. Of course, Phillimore was not suggesting that any parent can change the child’s domicile to any place whatsoever in the universe. In *School Directors v. James*, *supra* note 27, Chief Justice John Gibson wrote that a parent “may change the domicil of the child by changing the domicil of the family.... No infant, who has a parent...can in the nature of things, have a separate domicil....The parents’ domicil, therefore, is consequently and unavoidably the domicil of the child.” *Id.* Phillimore explicitly relied upon that case. PHILLIMORE, *supra* note 28, at 74. The general antebellum rule was that the domicile of the child follows the domicile of the father. *See Barber v. Barber*, 62 U.S. 582 (1858).

³⁹ PHILLIMORE, *supra* note 28, at 90. Aliens overstaying student visas is a familiar phenomenon, not unlike illegal immigration, and it is doubtful that a person can still be considered “received” into the United States after such visa expiration.

⁴⁰ *Id.* at 204.

⁴¹ *Id.* at 207. A concept similar to domicile *de jure* is “domicile by operation of law.” *See* 1 BOUVIER, *supra* note 16, at 443-44.

⁴² *See* note 29 *supra* and accompanying text.

⁴³ *See* note 34 *supra* and accompanying text.

illegal immigration, it would be anomalous to answer the question affirmatively for reasons we will get to shortly, in which case it is most appropriate that the domicile *de jure* be the primary domicile, within the meaning of the Citizenship Clause. However, in cases of legal immigration, or cases not involving any immigration, then the domicile *de facto* can be the primary domicile in some or all situations, including the situation with *Wong Kim Ark*.

To better understand why domicile *de jure* would be the only suitable type of domicile under the Citizenship Clause when unlicensed immigrants are involved, it is necessary to consider the concept of allegiance. It was well-known in the 1860s that domicile is joined with allegiance; having domicile implied at least a local allegiance to the United States.⁴⁴ Vine Kingsley was a prominent New York lawyer who wrote about this principle in 1865:⁴⁵

Allegiance arises from domiciliation. Foreigners owe temporary allegiance to the country where they reside. If they assume citizenship, then the allegiance is perpetual and not dependent on domicile. Allegiance is not a matter of choice, it arises from domicile, and because the government is bound to protect those within its allegiance.

During the Civil War, the British government acknowledged that its subjects who were domiciled in the United States had various duties of allegiance to the United States.⁴⁶ But unlicensed immigrants did not have legal capacity, in either

⁴⁴ WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND 369 (1852) (“Allegiance, both express and implied, is, however, distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary”).

⁴⁵ VINE WRIGHT KINGSLEY, RECONSTRUCTION IN AMERICA 24 (1865). See also DON DOYLE, THE AGE OF RECONSTRUCTION 336 n.72 (2024) (“Kingsley, a prominent New York lawyer...”). See also *Abington v. North Bridgewater*, 40 Mass. (23 Pick.) 170, 176 (1839) (“The fact of domicil is often one of the highest importance to a person... it fixes his allegiance....”) quoted in *Domicil*, 12 AM. L. REG. 257 (1864). Of course, the U.S. government can protect people who have no allegiance to the U.S. and no U.S. domicile, without any duty of allegiance arising; examples abound, because the U.S. is often a helpful and humanitarian nation.

⁴⁶ The British Ambassador to the U.S. acknowledged that Englishmen lawfully present in the U.S. necessarily had local allegiance to the U.S. (one might call this a statement against interest):

I have no desire that British subjects be exempted from all the obligations ordinarily incident to domicile, such as service in the local police, where imposed by the municipal law, or in companies formed exclusively for the maintenance of internal peace and order and for the protection of property. But no further military service can be required of them....

Letter from William Stuart, Ambassador of Great Britain, to William H. Seward, Secretary of State of the United States (Sept. 6, 1862), in PAPERS RELATING TO FOREIGN AFFAIRS 286-87 (1862) (the last ten words of that blockquote suggest the jurisdiction of the U.S. was not full and complete during wartime as to at least some foreign visitors). During the Civil War, aliens in the U.S. who had declared an intention to be naturalized (“declarant aliens”) but had not yet voted within the U.S. were drafted unless they abandoned their naturalization plans as well as their residence in the U.S.

wartime or peacetime, to pay any allegiance at all to the United States, as explained in a treatise by Matthew Bacon published in Philadelphia in 1860:⁴⁷

[E]very person is presumed to have a natural and necessary allegiance to that society that first protected and preserved him; and therefore he cannot pay any allegiance to any other society, unless he be afterwards received into it.

The U.S.-born child of unlicensed immigrants has the same domicile as his parents, regardless of the child's allegiance.⁴⁸ If domicile under the Citizenship Clause were not domicile *de jure*, then the parents could establish U.S. domicile, and thus be in the impossible situation of owing allegiance to the United States (as Vine Kingsley explained) while not being able to pay it due to never having been received into the United States (as Matthew Bacon explained). These considerations necessarily exclude unlicensed immigrants from the ancient tie that binds the sovereign to every citizen and every licensed immigrant. Even before the Citizenship Clause was adopted, the absence of that ancient tie would have prevented unlicensed immigrants from automatically becoming a citizen or subject.⁴⁹

For these reasons, the Citizenship Clause must refer to domicile *de jure* as applied to unlicensed immigrants, instead of domicile *de facto*. The federal government therefore has legitimate power to lawfully deny permission or recognition for unlicensed immigrants to establish domicile in the United States, and such domicile is prerequisite to birthright citizenship under the Citizenship Clause.⁵⁰

See GERALD NEUMAN, STRANGERS TO THE CONSTITUTION 69 (2010). A rule during that era was that, “the right of jurisdiction and authority over a merely *commorant foreigner*, though he be *subditus temporaries*, does not extend to compelling him to render civil or military services....” ROBERT PHILLIMORE, 1 COMMENTARIES UPON INTERNATIONAL LAW 270 (1854) (original emphasis). Cf. Robert Mensel, *Jurisdiction in Nineteenth Century International Law and its Meaning in the Citizenship Clause of the Fourteenth Amendment*, 32 ST. LOUIS U. PUB. LAW REV. 329, 351 (2013) (“an Englishman domiciled within the U.S. owed the U.S. neither allegiance nor military service....”). I am grateful to Professor Mensel for confirming that “the allegiance I referred to was full allegiance” rather than local allegiance. E-mail from Robert Mensel to author (January 10, 2025, 11:39 EST) (on file with author).

⁴⁷ Matthew Bacon, Henry Gwyllim, Charles Dodd, Byrd Wilson, and John Bouvier, 3 A NEW ABRIDGMENT OF THE LAW 421 (Philadelphia, Johnson & Co. 1860). Bacon initially wrote this treatise, which became a standard encyclopedia of the common law in England and America, and his coauthors kept the treatise up to date after he died. According to that same 1860 American edition, aliens could be “received” in different degrees; e.g. an alien could be received “totally” by naturalization, or be received partially by other procedures. See 1 *id.* at 199. The aliens who have most clearly never been “received” into any society are those who have always been deportable; meanwhile, English law regarding other aliens has changed considerably since the 1860s, including more ability to buy real estate.

⁴⁸ See, e.g., *Ludlam v. Ludlam*, 26 N.Y. 356 (N.Y. 1863) (“The domicil of the minor child is always that of the father during his life....”). See also note 27 *supra*.

⁴⁹ See Natelson & Hyman, *supra* note 5 at 27-35.

⁵⁰ The U.S. Supreme Court once stated in a footnote that, “illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a state.”

The last blockquote (of Matthew Bacon) raises the question of what it means to be *received* into the United States. Many things can amount to being *received* into the U.S. to one degree or another, including naturalization which marks a total reception, or merely using a valid passport which marks a partial reception. There is no legal reason why an alien, who wants to benefit from the Clause, must be *received* formally instead of informally into the United States, nor any reason why that permission to enter must be explicit. Chief Justice John Marshall long ago wrote that an “implied license” will suffice, but of course a valid prohibition upon entry defeats any implication of a license.⁵¹

Unlawful entry and unlawful presence are analogous to a non-permissive use of property, which can be legitimized by continuous, open, and notorious occupation for a term of years, at least in the context of adverse possession. Therefore, it is possible that an unlicensed immigrant could eventually be *received* by implication, years after immigrating, if his residence and status have been continuous, open, and notorious, so much so that law enforcement agencies have ample opportunity to respond. In short, the Citizenship Clause is only available for children of aliens who are *received* into the United States, not aliens who persistently evade, defy, or strain the resources of law enforcement agencies.⁵²

IV. STATUS OF U.S. TERRITORIES AND THE DISTRICT OF COLUMBIA UNDER THE CLAUSE

State and federal citizenship are a package deal at birth, as already described in Section II. This principle has significant ramifications for U.S. territories and also the District of Columbia, which will therefore be addressed now.

How U.S. territories and the District of Columbia are affected by the Citizenship Clause is not a simple matter. A court in 2021 declined to grant U.S. citizenship for residents of American Samoa, partly because of the last seven words of the Clause which are ostensibly about state citizenship.⁵³ That part of the court’s

Plyler v. Doe, 457 U.S. 202, 227 n.22 (1982). In support of that *dictum*, the Court cited a treatise published in 1912. See CLEMENT BOUVÉ, A TREATISE ON THE LAWS GOVERNING THE EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 340 (1912):

An alien, who, whether entering in violation of the immigration acts, or, after being duly passed by the immigration authorities in the manner provided by law, takes up his residence here with intent to remain has done all that is necessary for the acquisition of a domicile.

Id. Bouvé also said, again without citation, about unlicensed immigrants: “Their temporary allegiance to the United States was complete and gave rise to reciprocal protection....” *Id.* at 426. Insofar as these unsubstantiated opinions of Bouvé were accepted doctrine in 1912, law in the 1860s was different. See note 47 *supra* and accompanying text.

⁵¹ The Schooner Exchange v. McFadden, 11 U.S. 116, 144 (1812).

⁵² These include the Transportation Security Administration (TSA), the United States Border Patrol (USBP), Immigration and Customs Enforcement (ICE), and agencies of the border states.

⁵³ Fitisemanu v. United States, 1 F.4th 862, 875 n.16 (10th Cir. 2021) (*quoting* U.S. CONST.

opinion has been criticized because of its presumed effect upon residents of the District of Columbia.⁵⁴ But, putting aside the District for a moment, there is little doubt that the Citizenship Clause is inapplicable in the territories, and citizenship there is instead a matter for Congress and its naturalization power.

There was an effort in 1867 to explicitly include the territories in the Citizenship Clause, and that effort failed, which suggests that the territories are not covered by the Clause.⁵⁵ Thus, in all likelihood, the territories were not covered by the Citizenship Clause, including both “incorporated” and “unincorporated” territories.⁵⁶ Similarly, the Thirteenth Amendment (which banned slavery) distinguished the United States from other areas subject to its jurisdiction, which is consistent with the territories being among those other areas.⁵⁷ The immense territories existing in the 1860s were all destined for statehood, so the only things needed for them to acquire birthright citizenship were patience or naturalization.

The District of Columbia is another story. Old maps from the nineteenth century never distinguished the District from the United States (though they sometimes did distinguish the territories from the United States).⁵⁸ Nor was there any failed effort in the 1860s to add language into the Fourteenth Amendment about the District, as happened with the territories. So, under the Citizenship Clause, Washington D.C. is very much part of the “United States” and people who are born there to lawfully-domiciled parents are entitled not just to U.S. citizenship, but also to state citizenship. This is a consequence of state and federal citizenship being a package deal at birth.

amend. XIV, §1, cl. 1), *cert. denied*, 143 S. Ct. 362 (2022) (“Another textual consideration suggesting the Citizenship Clause’s exclusive application to state-born residents is its effect of rendering persons born in the United States ‘citizens of the United States and of the *State wherein they reside*’”) (original emphasis).

⁵⁴ Cassandra Burke & Irina Manta, *Integral Citizenship*, 100 TEX. L. REV. 1325, 1354 (2022).

⁵⁵ CONG. GLOBE, 40th Cong. 2nd Sess. 117 (1867). The effort was led by Congressman James Ashley, who had been a lead author of the Thirteenth Amendment.

⁵⁶ According to the dubious territorial incorporation doctrine, there is a constitutional distinction between “incorporated” territories, which are likely headed for statehood, and “unincorporated” territories. That doctrine was first suggested in a concurring opinion by Justice Edward White in 1901, joined by two others. *See Downes v. Bidwell*, 182 U.S. 244, 311-21 (1901).

⁵⁷ U.S. CONST. amend. XIII (banning slavery “within the United States, or any place subject to their jurisdiction”). Incidentally, after that amendment, there was apparently no attempt to deport the small subset of former slaves who had been unlawfully smuggled into the United States; they were impliedly received into the country, and were free to establish or continue domicile in the U.S.

⁵⁸ From 1850 to 1868, various maps used the term “United States” to include the District but not the territories. *See* Andrew Hyman, *More Cool Maps as Evidence of What the “United States” Meant in 1868*, THE ORIGINALISM BLOG (June 27, 2021, 6:44 AM), <https://originalismblog.typepad.com/the-originalism-blog/2021/06/more-cool-maps-as-evidence-of-what-the-united-states-meant-in-1868andrew-hyman.html> [web.archive.org/web/20210627163515/https://originalismblog.typepad.com/the-originalism-blog/2021/06/more-cool-maps-as-evidence-of-what-the-united-states-meant-in-1868andrew-hyman.html].

How to bring state citizenship to the people of the District is a political question,⁵⁹ and such questions are often handled less than perfectly.⁶⁰ Retrocession and statehood are two possible solutions. In the mean time, officials should continue to recognize that the Citizenship Clause does confer birthright U.S. citizenship on domiciled residents born in the District, because that would have been the result if Congress had been doing its job ensuring compliance with the Clause; it is better to give people some of what they are entitled to, than none at all.

The congressional inertia since 1868 may be attributable to a phenomenon once described by Justice Robert Jackson: “even the North never fully conformed its racial practices to its professions.”⁶¹ The Citizenship Clause does profess a right of state citizenship in the nation’s capital, not just U.S. citizenship, and license plates in the District of Columbia aptly declare “taxation without representation.”

Enclave status for the District would be another solution, as opposed to statehood or retrocession. By enclave status, I mean a place “for the erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings” (as the Constitution puts it), in contrast to a district “not exceeding ten miles square.”⁶² Such enclave status could allow residents to have citizenship in Maryland.⁶³ According to the Congressional Research Service, enclave status was permitted when Maryland donated land for the national capital:⁶⁴

The Maryland statute ceding the land made the cession “pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States,” suggesting that Maryland transferred the land for the limited purpose of creating the District of Columbia under the District and Federal Enclaves Clause (found in section 8 of Article I).

Under its section five enforcement power, Congress could unilaterally change D.C. into a federal enclave, which would bring state citizenship to its residents,

⁵⁹ See Jessica Bulman-Pozen & Olatunde C.A. Johnson, *Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood*, 110 GEORGETOWN LAW J. 1269, 1273, 1289 (2022) (“Although D.C. statehood is a constitutional imperative, it is not a judicially enforceable one....The Constitution requires that all American citizens living in the United States be able to claim state citizenship where they reside.”).

⁶⁰ See generally JOSEPH JAROSCAK, CONG. RSCH. SERV., IF11443, DISTRICT OF COLUMBIA VOTING REPRESENTATION IN CONGRESS: OVERVIEW OF PROPOSALS, (2024).

⁶¹ Robert Jackson, *Memorandum by Mr. Justice Jackson*, in I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES 137 (Mark V. Tushnet ed. 2008).

⁶² See U.S. CONST. art. I, § 8, cl. 17 (re. the District and enclaves).

⁶³ See *Evans v. Cornman*, 398 U.S. 419 (1970). The District was established at its present location as part of the Compromise of 1790, which included southern payment of northern war debts. Maryland and Virginia received some compensation as part of the Compromise of 1790, for contributing the land; Virginia got a tax break, and Maryland got a promise that all public buildings would be located on the Maryland side with concomitant commercial benefits. See Jessie Romero, *A Capital Compromise*, ECON FOCUS 24, 26 (2019). The Virginia part was retroceded in 1847.

⁶⁴ KENNETH THOMAS, CONG. RSCH. SERV., 7-5700, HEARING ON H.R. 51, THE WASHINGTON D.C. ADMISSION ACT 3 (2019).

while maintaining federal control of the District.⁶⁵ All of this without violating the Twenty-Third Amendment, assuming a tiny zone remains as a remnant of the current District.⁶⁶ Other solutions are available but they would require action by Maryland, or a constitutional amendment.⁶⁷

In all likelihood, the nation's capital would already be a federal enclave today, if there were not an alternative (statehood) that would achieve political goals unrelated to the Fourteenth Amendment, such as shifting the balance of power in the U.S. Senate. The District could be turned into a federal enclave, and then statehood — or reacquisition of land by Maryland — could still be considered after that. By turning the District into a federal enclave, its lifelong residents would no longer be “stateless” in the sense of lacking citizenship in any of the U.S. states, and that statelessness is an ongoing violation of the Citizenship Clause, as Professors Bulman-Pozen and Johnson have argued.⁶⁸

V. PURPORTED INFLUENCE OF FRANCE UPON THE CITIZENSHIP CLAUSE

The Court in *Wong Kim Ark* (1898) discussed eighteenth-century French law, among other things. Consider this problematic excerpt from *Wong Kim Ark* about French law:⁶⁹

[A]t the time of the adoption of the Constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, “citizens, true and native-born citizens, are those who are born within the extent of the dominion of France,” and “mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicile”.... The general principle of citizenship by birth within French territory prevailed until after the French Revolution, and was affirmed in successive constitutions, from the one adopted by the Constituent Assembly in 1791 to that of the French Republic in 1799. The Code Napoleon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, *jus soli*, the rule of descent or blood, *jus sanguinis*, as the leading principle....

⁶⁵ U.S. CONST. amend. XIV, §5. It is beyond this article's scope to consider how much power the president might have to initiate or participate in such a change.

⁶⁶ See U.S. CONST. amend. XXIII. The District could be converted into a federal enclave that is part of Maryland, except for a tiny zone (e.g. a triangle with the seats of the three branches at the vertices except for any domicile within the triangle). Of course, the White House is not a domicile because, for example, no president can stay beyond his tenure in office. The most legitimate way to handle the three electors appointed on behalf of that tiny zone would be to require that they abstain.

⁶⁷ See U.S. Const art. IV, §3 (re. forming new states). See generally Derek Muller, *Twenty-Third Amendment: Problems Confronting District of Columbia Statehood*, HARV. J. L. & PUB. POL'Y PER CURIAM 1 (2021).

⁶⁸ See Bulman-Pozen, *supra* note 59. See generally Weckstein, *supra* note 18 (discussing whether a person who leaves his U.S. state becomes stateless until he settles in a new one); text accompanying note 53 *supra* (Phillimore on similar subject).

⁶⁹ *United States v. Wong Kim Ark*, 169 U.S. 649, 666-667 (1898) (citations omitted).

Generally speaking, it is best for American courts to stick with Anglo-American law, and if American legislators enact legislation in reliance upon foreign law, then courts would still be wise to exercise caution. The reception statutes enacted by the newly-independent states specifically received English common law as domestic U.S. law, rather than receiving the law of France or other countries. Also, putting too much weight on foreign law outside the Anglo-American legal tradition risks misunderstanding those foreign laws, as happened here, according to historian Peter Sahlins.⁷⁰

[W]hen modern historians of French nationality argue...that *jus soli* was originally a feudal practice that persisted as the dominant mode of attributing French citizenship until the Civil Code (1803), their language caricatures practices of both the medieval and modern period.

Moreover, a close look at the French constitutions referred to in the Court's *Wong Kim Ark* opinion reveals that, "the Constitution of [1791] — and those of 1793, 1795, and 1799 — only provided the possibility of citizenship to established male property holders who fulfilled the statutory requirements."⁷¹ Those French constitutions are therefore far removed from citizenship law in the United States, and it would be best not to seek guidance from them.

As to Robert Pothier, who was mentioned and quoted by the Court in *Wong Kim Ark*, he was an eighteenth-century French jurist of great renown. The Court in *Wong Kim Ark* offered this quote from Pothier: "mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicile."⁷² But that general rule does follow from the Citizenship Clause in the vast majority of cases, especially if Professor Ramsey is correct that birthright citizenship is available to U.S.-born children of foreign parents who are lawfully domiciled in the United States.⁷³ Pothier did not discuss any of the exceptions to that general rule, and it is therefore unclear what exceptions he would have approved.

If Pothier's statement is taken as prohibiting all exceptions (which it should not be) then we would need to make constitutional birthright citizenship available for several categories of people for whom it is currently unavailable, including children of ambassadors, and invaders.

Although the use of old French law by the Court in *Wong Kim Ark* was inaccurate, this is no criticism of the holding in that case. The Court supported its holding by proper recourse to Anglo-American law, including the Citizenship Clause.

The distinction between *de facto* domicile and *de jure* domicile that has been discussed in this article, and that was well-known in the 1860s, appeared in French legal cases, before its appearance in the leading English-language international law

⁷⁰ PETER SAHLINS, UNNATURALLY FRENCH: FOREIGN CITIZENS IN THE OLD REGIME AND AFTER 58 (2018).

⁷¹ *Id.* at 274.

⁷² ROBERT POTHIER, 9 OEUUVRES DE POTHIER, TRAITÉ DES PERSONNES ET DES CHOSSES 17-20 (M. Bugnet ed. 1846).

⁷³ See Ramsey, *supra* note 5. The present article in no way suggests that Professor Ramsey is incorrect on this point.

treatise by Phillimore.⁷⁴ For purposes of understanding what Americans intended the Citizenship Clause to mean in the 1860s, it is more important what Phillimore wrote than what exactly happened in the French proceedings he described, because Phillimore's reputation was such that his integrity and accuracy were taken for granted.⁷⁵ The Framers and ratifiers of the Citizenship Clause must have known that resolving any international law issues raised by the Clause would be influenced by the pre-1868 writings of Phillimore.

VI. CONCLUSION

The Citizenship Clause of the Fourteenth Amendment has an implicit requirement of domicile within a U.S. state or the nation's capital. Because domicile has permanence by definition, temporary foreign visitors cannot claim citizenship for U.S.-born children.

A presumption as old as the Roman Empire is that domicile does not begin until a person has lived in a place for a period of years, not unlike current naturalization statutes. Such a presumption would be difficult for an unlicensed immigrant to overcome, because residency in the U.S. is susceptible to being terminated at any time by immigration officials.

Even after several years, and even if a genuine intent to remain at the U.S. domicile can be proven despite its difficulty and illegality, there remains one insuperable obstacle to claiming U.S. domicile under the Citizenship Clause: the domicile required by the Citizenship Clause is necessarily *de jure* domicile rather than *de facto* domicile for unlicensed immigrants. Otherwise, they would be in the impossible spot of owing allegiance but being unable to pay it. That still leaves open the possibility that they could be received into the U.S., either via naturalization, or a process similar to adverse possession.

No people born in U.S. territories were intended to have constitutional birthright citizenship, but the situation is different for U.S.-born people whose homes are in the nation's capital. They are constitutionally entitled to both U.S. and state birthright citizenship, but again that excludes people whose parents are not lawfully present in the U.S. at the time of birth.

It is sometimes said that the United States follows a tradition of *jus soli* rather than *jus sanguinis* (i.e. birthright based upon soil rather than parentage), and that is almost correct. But even France in the eighteenth century did not perfectly follow that rule, nor did the Fourteenth Amendment in the next century. Lord Coke went so far as to deprecate *jus soli*, by comparing it to climate as a non-factor for determining whether a newborn becomes a subject.⁷⁶ In addition to soil, the

⁷⁴ See PHILLIMORE, *supra* note 28, at 204-226.

⁷⁵ In 1868, the U.S. Supreme Court referred to the "recent learned and most valuable commentaries of Mr. Phillimore (now Sir Robert Phillimore, Judge of the High Court of Admiralty of England), on international law...." *The Georgia*, 74 U.S. 32, 41 (1868). See also *The International Cases Summed Up*, NEW YORK TIMES, Nov. 24, 1861 at 4 (he is "the highest English theoretic authority"); BOSTON EVENING TRANSCRIPT, April 22, 1867 at 2 (he "takes precedence of all the English bar on matters of international law").

⁷⁶ See note 8 *supra* (quoting *Calvin's Case*). To the extent that Coke in *Calvin's Case* endorsed the rule of *jus soli*, he did so only "by implication." Polly Price, *Natural Law*

Citizenship Clause takes into account parental allegiance and domicile, in cases where entry into the United States has been unlawful.

People who cross the U.S. border unlawfully cannot obtain U.S. citizenship for their U.S.-born children via the Citizenship Clause, but could still do so via individual or collective naturalization. The latter type of naturalization already applies to residents of Puerto Rico, and residents of tribal reservations. As mentioned at the outset of Section III, there are upsides as well as downsides to citizenship for children of unlicensed immigrants. Illegal immigration was rare in the 1860s, but statesmen of that era had considerable foresight; perhaps that foresight helps to explain why the law leaves this matter to Congress instead of establishing a rigid constitutional rule. But even if they lacked such foresight, the words they wrote have meaning, and we should apply their original meaning as best we can to unanticipated circumstances, at least prospectively.

and Birthright Citizenship in Calvin's Case (1608), 9 YALE J. LAW & HUMANITIES 73, 116 (1997). The rule of *jus soli* was never fixed in stone, and “changed in response to changing political exigencies.” *Id.* at 78. Around the time Calvin's Case was decided, France and Italy were using a hybrid system of *jus soli* and *jus sanguinis* for children born on their soil. *Id.* at 124-125. On foreign soil outside Europe, newborns automatically got the same European citizenship as their parents had. *See, e.g., id.* at 133. England abandoned the *jus soli* rule in 1981. *Id.* at 77 n.15. The present article suggests no abandonment of *jus soli*, but only restraint in its application consistent with the text of the Citizenship Clause.

PROTECTING COMMONERS' GOODS PLURALIST COEXISTENCE THROUGH THE COMMON GOOD CONSTITUTION'S SUBSIDIARITY MUNICIPALISM

Gregory E. Louis*

ABSTRACT

*Proceeding from the assumption that Harvard Law Professor Adrian Vermeule's theory of common good constitutionalism must ultimately prevail in the debate about what Anglo-American law is, this Article contributes to the discussion by proposing how his skeletal theory can serve the interests of outsiders. Building on the perspective informing the author's previous essay *The Jurisprudence of Trousered Apes*, the Article focuses on what common law constitutionalism means for commoners. It seeks to anticipate and allay that natural anxiety which the revival of Tradition provokes for outsiders by demonstrating how common good constitutionalism can be employed to advance pluralism. For this demonstration, it sketches a constitutional framework for producing pluralist outcomes based on the principle of subsidiarity, a pillar of the classical legal tradition. It contends that classical subsidiarity can produce a constitutionalism, one that the Article denominates subsidiarity municipalism, to assist commoners and other dissenters from Tradition in protecting their temporal gains.*

KEYWORDS

common good constitution; municipalism; subsidiarity; legal pluralism

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I. INTRODUCTION: PANEGYRIC, POINT, AND PLAN

Having previously claimed legal positivism and textualism as the methods of commoners, my cohort,¹ I undertake this argument with a considerable handicap. Not only am I to explain how a commoner can find Adrian Vermeule's revival of the classical legal tradition to merit affirmation. Worse, I also am left to square such praise with the jurisprudence of trousered apes. With much to cover in addition to doing the job that the title promises, I turn to addressing the first issue post haste.

First, the exaltation. Simply stated, Adrian Vermeule's theory of common good constitutionalism is a genius excavation of the Anglo-American legal tradition's sheer breadth. CGC's thesis that the Anglo-American common law system is best interpreted as a local variant of the classical legal tradition² consiliently raises and builds upon the same genealogy that an outsider—a Chinese jurist from a civil law system—grasped 70 years ago.³ At this Article's conclusion, I will elaborate how common good constitutionalism (CGC) aligns with the jurisprudence of trousered apes. But for now, I must concede that CGC is a better way of broadening the law toward including others than the legal positivism and textualism I so fervently defended for reasons that Vermeule perceptively identified.⁴ Such a shift is best explained by elaborating what CGC does well.

As my previous essay framed the issue, asking what the law is amounts to the practical question of which exercises of power are good.⁵ Engaging with the pandemic eviction ban case and seeking to defend a sweeping exercise of executive power protecting the disenfranchised, I there invoked legal positivism and textualism as answers better suited to protecting commoners against force.⁶ I argued that law understood as a plain statement of power contained in a text and interpreted according to the rules of English grammar would be less apt to harm commoners' interests than an understanding of law as a patrimony from which commoners are estranged.⁷

But as Vermeule identifies in his CGC Monograph, legal positivism and textualism do not explain which exercises of power are legitimate.⁸ To say that the law is text to be read in its ordinary grammatical sense does not address whether a

¹ Gregory Louis, *The Jurisprudence of Trousered Apes*, 69 UCLA L. Rev. Discourse 146 (2022).

² ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION I (2022) [hereinafter "CGC MONOGRAPH"].

³ JOHN C.H. WU, FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW 59, 102-106, 125-131 (1955) (arguing that Anglo-American common law is rooted in natural law understanding of power and rights correlated with responsibility and duties, citing examples from English and U.S. jurisprudence). For a background to that author and his study, see John T. Noonan, Jr., *Fountain of Justice*, 69 HARV. L. REV. 1519-1522 (1956); Herbert W. Titus, *God's Revelation: Foundation For the Common Law*, 4 REGENT. U. L. REV. 1-2 (1994). On his being an outsider, see WU at 55, 57.

⁴ The concern animating such a defense is abuse of power to the detriment of the weak. Vermeule speaks to this in CGC MONOGRAPH, *supra* note 2, at 13.

⁵ Louis, *supra* note 1, at 149-150.

⁶ *Id.* at 149-150.

⁷ *Id.* at 159-162.

⁸ CGC MONOGRAPH, *supra* note 2, at 6, 16.

given exercise of state power based on that meaning is good.⁹ Put differently, all legal questions raise a question of practical morality: they are always a matter of whether some imposition of government power qualifies as law because it corresponds to an account of what is just.¹⁰ Vermeule’s semantic excursion on the difference between law (*lex*) and justice (*ius*)¹¹—that which this legal tradition has also phrased as a question of higher law versus ordinary law¹² – highlights how much English suffers from a single word covering both the descriptive and normative.

CGC is a superior account of the law because it harmonizes both the Left and the Right’s instincts about the good. It does so because it focuses on structures and institutions—the role of government – rather than various accounts of rights. With such an approach, Vermeule’s CGC theory answers questions that other legal theories fail to account for. For example, progressive constitutionalism has long suffered from an inability to answer why the famous footnote 4 to *United States v. Caroline Products Co.*¹³ should remain the standard for wielding government power, with its unexplained proposition that commercial activity can freely be regulated while the regulation of social activity stands constrained, no matter the harm.¹⁴ This longstanding concern is become even more pronounced when, as the Patient Protection and Affordable Care Act litigation shows, progressives have come to recognize that free human movement has real economic consequences for everyone.¹⁵ As for conservatives, CGC provides a more sensible account of the U.S. Constitution’s Ninth Amendment (and state equivalents)¹⁶ as a textual acknowledgement of U.S. Constitutionalism’s natural law background¹⁷ than

⁹ *Id.* at 16.

¹⁰ *Id.* at 183. This same point is made in my prior essay. See Louis, *supra* note 1, at 150-151.

¹¹ *Id.* at 3-4.

¹² Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 154 (1928) (noting the ambiguity of “law” historically encompassing both a higher and lower content).

¹³ 304 U.S. 144, 153 n.4 (1938).

¹⁴ For this critique, see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 THE SUPREME COURT REV. 397, 428 (1987) (contending that the political theory informing *Carolene Products* needs to be updated because it allowed special interest litigation resulting in a harmful product being sold solely to dairy farmers’ benefit).

¹⁵ The core argument that the Obama Administration raised in its defense of using the U.S. Constitution’s commerce clause as a basis for the Patient Protection and Affordable Care Act. Brief for Respondents at 7-8, 18-21, *Nat’l Fed. of Independent Business v. Sebelius Brief of Respondents*, 2012 WL 37168 (2012) (contending that commerce clause supports individual coverage mandate because millions of uninsured people participate in the health care market based on state and federal laws, reflecting deeply rooted societal values, mandating that they be treated).

¹⁶ That state constitutions have long contained comparable clauses, see generally ANTHONY B. SANDERS, *BABY NINTH AMENDMENTS: HOW AMERICANS EMBRACED UNENUMERATED RIGHTS AND WHY IT MATTERS* 15 – 19 (2023); NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS* 635 – 662 (1997).

¹⁷ Cf. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 119-122, 298-299 (2000) (connecting U.S. Constitution’s Ninth Amendment to Preamble’s notion of popular sovereignty building on Declaration of Independence and Anglo-American charters of liberty such as the Magna Charta and English Bill of Rights). In addition, a 1902 Iowa Supreme Court decision relevant to the first principle discussed below in Section III.B references language such as that in the Ninth Amendment and its state equivalents as authority supporting unenumerated natural rights. See *State ex rel. White v. Barker*, 89 NW 204, 207 (Io. 1902) (“Some of the cases we have cited hold

a redundant “ink blot” to be overlooked.¹⁸ Or even, for that matter, the Left’s conceit that it merely represents an alternative basis for rights previously based on substantive due process.¹⁹

But most relevant during the early days of the second Trump Administration apparently powered by Project 2025,²⁰ CGC answers the Left’s perennial solicitude about what the opposition is up to. In this vein, I acknowledge that Professor Vermeule insists that CGC is a “third way,” neither progressive nor conservative.²¹ But in elsewhere promoting it as the defeasance of liberalism, he gives up the ghost,²² supporting accusations that CGC is an authoritarian program.²³ So, one may imagine that Leftist pluralists fearfully approach CGC as yet another program in line with that observation of American conservatism’s essence as the exercise of power protecting but not binding the U.S. polity’s intended beneficiaries while binding and yet exposing its outsiders.²⁴

All this finally brings up this Article’s contribution to the discussion. Proceeding from Vermeule’s own prediction that CGC must ultimately prevail²⁵ — that we must all become common good constitutionalists²⁶ — this Article accepts

to the doctrine that the rights of the inhabitants of a municipal corporation to local self-government is one of the rights retained by the people.”)

¹⁸ See, e.g., Sheldon L. Richman, *Dissolving the Inkblot: Privacy as Property Right*, CATO INSTITUTE (January/February 1993), <https://www.cato.org/policy-report/january/february-1993/dissolving-inkblot-privacy-property-right> (criticizing the inkblot dismissal stated in ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 183-85 (1990)).

¹⁹ See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1223-1224 (1990) (referencing scholarship making this argument).

²⁰ See, e.g., Faith Wardwell, *The Key Project 2025 Authors Now Staffing the Trump Administration*, NBC NEWS (March 12, 2025), <https://www.nbcnews.com/politics/trump-administration/key-project-2025-authors-now-staffing-trump-administration-rcna195107>.

²¹ Adrian Vermeule, *Liberalism’s Good and Faithful Servants*, COMPACT MAGAZINE (February 28, 2023), <https://www.compactmag.com/article/liberalism-s-good-and-faithful-servants/> [hereinafter “Vermeule Compact Magazine”].

²² See also Adrian Vermeule, *Why I Lost Interest in the Liberalism Debate: On Science-Fictional Political Theory*, THE NEW DIGEST (February 3, 2024), <https://thenewdigest.substack.com/p/why-i-lost-interest-in-the-liberalism> [hereinafter “Vermeule Liberalism Debate”] (arguing that political liberalism is unsustainable and that law must turn into sacramental liberationism or the reassertion of tradition values holding “unchosen moral, political and legal constraints as legitimate constraints on individual and social action”).

²³ See, e.g., Michael A. Wilkinson, *The Authoritarian Nature of Common Good Constitutionalism*, 69 AM. J. OF JURISPRUDENCE 89-106 (2024).

²⁴ Henry Grabar, *The Pithiest Critique of Modern Conservatism Keeps Getting Credited to the Wrong Man*, SLATE (June 3, 2022), <https://slate.com/business/2022/06/wilhoits-law-conservatives-frank-wilhoit.html> (quoting Ohio classical music composer Frank Wilhoit’s aphorism “summing up the modern Republican party’s hypocrisy and moral bankruptcy”).

²⁵ CGC MONOGRAPH, *supra* note 2, at 184.

²⁶ A reference to Elena Kagan’s remark that “We are all originalists now” during her 2010 confirmation hearing, one that she more recently contends has been taken out of context. See Josh Gerstein, *Kagan Hopes Supreme Court’s Ideological Divide on Precedent Isn’t Permanent*, POLITICO (September 22, 2023), <https://www.politico.com/news/2023/09/22/elena-kagan-supreme-court-precedent-speech-00117760>.

Professor Vermeule’s invitation to build upon his sketch.²⁷ Consistent with the perspective informing the jurisprudence of trousered apes, the Article focuses on what CGC means for commoners. It seeks to anticipate and allay that natural anxiety which the revival of Tradition provokes for outsiders by demonstrating how CGC can be employed to advance pluralism. For this demonstration, it sketches a constitutional framework for producing pluralist outcomes based on the principle of subsidiarity, a pillar of the classical legal tradition.²⁸ It contends that classical subsidiarity can produce a constitutionalism, denominated here as subsidiarity municipalism, serving to assist commoners and other dissenters from Tradition to protect their temporal gains.

The Article argues for subsidiarity municipalism in four additional sections. In section II, the Article identifies the problem that CGC fails to resolve: what happens to outsiders like myself under Tradition. The Article explains that at least Professor Vermeule’s formulation of CGC suffers from glibness about Tradition’s hostility to outsiders, an aspect that even conservative sympathizers recognize.²⁹ After identifying this problem, in Section III the Article promotes the municipal corporation as the way Tradition can protect pluralism. To make this argument, the Article excavates the classical legal tradition’s principle of subsidiarity and then applies it to develop a constitutionalism that empowers outsiders to protect their interests through the formation of inclusive communities mediated by higher structures. It identifies classical subsidiarity’s five implications for U.S. constitutionalism and then applies these five principles to three live controversies arising from the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*³⁰: those about abortion, same-sex couples, and sex work. Following Vermeule’s argument in his book, in Section IV the Article defends pluralist coexistence as what the Roberts Court has been advancing through its jurisprudence about the conflict between association rights and general law. It ends, in Section V, with a conclusion summarizing the argument and ending with some reflections about how subsidiarity municipalism aligns with the jurisprudence of trousered apes.

II. LACKING SOLIDARITY: CGC’S BLIND SPOT

However compendious, Professor Vermeule’s sweep of Anglo-American law is largely disinterested in its treatment of what my previous essay termed commoners. His monograph says nothing about what CGC means for people who will live outside of Tradition’s conception of the good life. One commentator has found such indifference to be characteristic of integralism, the political theory that CGC most resembles.³¹ In a pluralistic society where many dissent from Tradition to

²⁷ CGC MONOGRAPH, *supra* note 2, at 25 (“I hope to spark enough interest that others will explore similar themes[.]”).

²⁸ *See infra*, Section III.A.

²⁹ *See infra*, note 32.

³⁰ 597 U.S. 215 (2022).

³¹ *See, e.g.*, Terence Sweeney, *Integralism’s False Promise: In Search of Politics That Enables the Good*, COMMONWEAL (February 6, 2024), <https://www.commonwealmagazine.org/sweeney-vallier-integralism-liberalism-dorothy-day> (in reviewing KEVIN VALLIER,

varying degrees, this is a significant gap oppugning its practicality. Indeed, it is one of the reasons why many conservatives who disagree with the Roman Catholic Church's interpretation of Tradition have expressed reservations about CGC.³²

Before elaborating this problem, this observation should not be regarded as a criticism of CGC for a simple reason. Because Professor Vermeule frames his CGC Monograph as a broad sketch,³³ readers should take this at face value and not fault its omissions. He is within his rights, as claimed in the book, to have devoted seventy-thousand rather than seven hundred thousand words on the core idea, so leaving specifics for further elaboration.³⁴ That said, I acknowledge extrinsic evidence suggesting that Professor Vermeule's omission reflects principled disinterest. This Article already mentioned Professor Vermeule's recent statement about arresting and uprooting liberalism,³⁵ an apparent admission to what a *New Yorker* article comparing CGC to integralism had suspected.³⁶ In a more recent writing, Professor Vermeule also justified his silence on pluralistic compromise with skepticism that it is attainable in principle, insinuating that conversion might be the ultimate goal.³⁷

ALL THE KINGDOMS OF THE WORLD: ON RADICAL RELIGIOUS ALTERNATIVES TO LIBERALISM (2023), defining integralism as a postliberal politics centered on directing people to their natural good and showing little care for the poor). For the connection between CGC and integralism, see Garrett Epps, *Common-Good Constitutionalism Is an Idea as Dangerous as They Come*, THE ATLANTIC (April 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/>.

³² See, e.g., George F. Will, *When American Conservatism Becomes Un-American*, THE WASHINGTON POST (May 29, 2020), https://www.washingtonpost.com/opinions/when-american-conservatism-becomes-un-american/2020/05/28/336a953a-a0f6-11ea-b5c9-570a91917d8d_story.html; Rob Dreher, *The Grand Inquisitor Option*, THE AMERICAN CONSERVATIVE (Feb. 26, 2023), <https://www.theamericanconservative.com/the-grand-inquisitor-option/>:

This is where the integralists give me the hives. To govern a people against their will is tyranny. I would prefer to live in a tyranny like Assad's Syria if the alternative was an Islamist tyranny. But tyranny is not a good thing. The only way Catholic integralists like [Sohrab] Ahmari could achieve what they want in post-Christian America -- or even in an America in which Catholics were the minority, as they are now, and would be even if everybody who professed Christianity was in church every Sunday -- is by tyranny. I don't think this bothers them. Indeed, Adrian Vermeule, the tribal leader of American integralists, has written that right-thinking Catholics should march through the institutions of liberalism in order to set themselves up to make the state integrally Catholic.

³³ CGC MONOGRAPH, *supra* note 2, at 25.

³⁴ *Id.*

³⁵ *Supra* note 22 and accompanying text.

³⁶ Benjamin Wallace-Wells, *What American Conservatives See in Hungary's Leader*, THE NEW YORKER (September 13, 2021), <https://www.newyorker.com/news/annals-of-inquiry/what-rod-dreher-sees-in-viktor-orban>.

³⁷ Vermeule Liberalism Debate, *supra* note 22: ("I believe that there can be no such thing as liberal pluralism even in principle, because liberal pluralism is, as [Ryszard] Legutko explains, just another monism — the special case of monism that relentlessly drives non-liberal comprehensive views from the public sphere, by coercion and the force of law if necessary, including coercion effected indirectly through employment relationships and the structure of the 'free' market.").

This certainly seems to support an assessment of CGC as authoritarian.³⁸

Despite this extrinsic proof, this Article refrains from reading malevolence into the CGC Monograph's silence on outsiders. But no matter how well intended, this Article is clear that Vermeule's formation of CGC presents a grave challenge to outsiders' existence within a CGC polity. This conclusion is rooted not in Professor Vermeule's own thoughts on the CGC project but rather in his framing of Tradition. The problem is evident in the very example that Professor Vermeule adduces to dispel concerns that CGC is hostile to openness.

In the CGC Monograph, Professor Vermeule's devotes a section to moral wrongs enacted in the name of Tradition. He takes this problem up in his criticism of the U.S. Supreme Court's decision in *Obergefell v. Hodges*.³⁹ To work around the question that *Obergefell* raises—whether mandating states to recognize same-sex marriage on equal protection grounds is a legitimate development of the U.S. Supreme Court's marriage jurisprudence extending the right to interracial couples, child-support debtors, and prison inmates⁴⁰—Vermeule invokes John Henry Newman's theory of developing Tradition.⁴¹ He argues that unlike same-sex marriage, the bigotry at issue in those other cases represents misunderstandings of Tradition. Specifically, he contends that the criteria of Tradition were correctly applied to prohibit those forms of bigotry because the courts “invalidated legislative or administrative action that tacked on arbitrary and artificial criteria that were extrinsic to marriage properly understood, and were thus unreasonable in just the way that classical law condemns.”⁴² To him, excluding interracial unions from marriage “cripple[d] or mutilate[d] the institution by grafting onto it naturally irrelevant or arbitrary accidents.”⁴³ He argues that race is irrelevant but sex matters because marriage is fundamentally about procreation, a point he makes by quoting from Chief Justice John Roberts' *Obergefell* dissent.⁴⁴

For all its perspicacity and earnestness – this Article acknowledges that Professor Vermeule himself is in a marriage that likely would have been unlawful before *Loving*⁴⁵ – his argument from Newman's theory does not address lurking

³⁸ See *supra*, note 23.

³⁹ 576 U.S. 644 (2015).

⁴⁰ CGC MONOGRAPH, *supra* note 2, at 131 (citing *Loving v. Virginia*, 338 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safely*, 482 U.S. 78 (1987)).

⁴¹ CGC MONOGRAPH, *supra* note 2, at 23, 123-24 (citing JOHN HENRY NEWMAN, THE GRAMMAR OF ASSENT (1870) for proposition that authentic Tradition develops by assimilating new data into its framework through the process of determination and adopting Newman's seven principles of authentic development).

⁴² *Id.* at 132.

⁴³ *Id.*

⁴⁴ *Id.* at 132-133.

⁴⁵ He is married to Yun Soo, an Asian-American woman. For much of U.S. History, a union between a White man and Asian woman would have been prohibited under anti-miscegenation laws banning marriages between Whites and various types of Asians. See, e.g., Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race,"* in SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY 467-68 and n. 13 (Martha Hodes ed., 1999) (noting jurisdictions whose laws banned marriages between Whites and Asian Americans or “Malays”); William D. Zabel, *Interracial Marriage and the Law*, in INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW 57 (Werner Sollors ed., 2000).

concerns for two reasons.

First, Tradition is inherently exclusionary. Professor Vermeule is clear that the Anglo-American legal tradition is a local variant of the broader Western legal tradition rooted in Roman law and developed by the Roman Catholic Church.⁴⁶ Professor Vermeule's chief partner and common co-author Professor Conor Casey has consistently described common good constitutionalism as grounded in a classical legal tradition that is "the stew of Roman law, canon law, and the other legal sources that formed the matrix within which European legal systems developed—and regional adaptations of the *ius commune* like the Anglo-American common law tradition."⁴⁷ For all the Roman Empire's universalist pretensions, a view with which this Article shares some sympathy,⁴⁸ its sensibilities are insuperably particular. Though purporting to have developed a *ius gentium*, or a law of the nations, it is unquestionable that this "universal" law was based on Mediterranean practices.⁴⁹ Ultimately, the Roman magistrate who determined law was a particular type of human being rooted in a particular culture resolving disputes between specific peoples thousands of years ago. Their specific conclusions embedded within a patrimony handed down the centuries and assimilated into various European and American legal systems represents values, morals, and modes of reasoning that other people, including many contemporary Europeans and Americans, do not hold or share. Because of this, the Western legal tradition, at a certain level of specificity, will seem hostile to members of multiethnic society. If I have read Vermeule correctly and understand his familiarity with Chinese civilization and law,⁵⁰ I understand him to agree with C.S. Lewis's argument in the *Abolition of Man* that the Western natural law is itself a local variant of the universal *Tao*.⁵¹ But Western Law must still be a conception of the *Tao* reflecting an outlook unique to certain peoples. To make this point by reference to one variety of Western law, we can analogize to the particularly of *laïcité*, one of the French constitution's pillars.⁵² The term, often translated as "secularism,"⁵³ is nonetheless distinct even among European experiences with religion,⁵⁴ and for reasons particular to France's constitutional development.⁵⁵

⁴⁶ See *supra*, note 1.

⁴⁷ Conor Casey, *Common Good Constitutionalism and Constitutional Change* (August 10, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4939257 [hereinafter "Casey Const. Change"].

⁴⁸ See *infra*, Section III.A.

⁴⁹ See *infra* note 127 (citing DE ZULUETA).

⁵⁰ He took his undergraduate degree from Harvard *summa cum laude* in East Asian Languages and Civilization. For evidence of this familiarity, see also Vermeule Dominus Mundi, *infra* note 92 (citing Chinese Tradition in defense of empire as a great unity that promises universal piece).

⁵¹ See CGC MONOGRAPH *supra* note 2, at 3. For C.S. Lewis' notion of the *Tao*, see C.S. LEWIS, THE COMPLETE C.S. LEWIS SIGNATURE CLASSICS 472-473 (2002).

⁵² Rachel Donadio, *Why Is France so Afraid of God: How the Country Came to View Religion as a Threat to National Identity*, THE ATLANTIC (November 22, 2021), <https://www.theatlantic.com/magazine/archive/2021/12/france-god-religion-secularism/620528/>.

⁵³ Michel Troper, *French Secularism, or Laïcité*, 1 CARDOZO L. REV. 1267 (2000).

⁵⁴ Donadio, *supra* note 52 ("The term has come to express a uniquely French insistence that religion, along with religious symbols and dress, should be absent from the public sphere. No other country in Europe has followed this path").

⁵⁵ Troper, *supra* note 53, at 1272 – 1276 (describing this history).

So that the point is not lost in abstraction, let us take up the concrete implications of Tradition's limits. Hard cases, or those involving clashes of absolute values, ultimately must be resolved with principles of *ius* reflecting United States custom.⁵⁶ This is the sense in which Professor Vermeule is correct to classify Ronald Dworkin and his legal philosophy as moral as opposed to positivistic.⁵⁷ For Dworkin's Judge Hercules⁵⁸ arrives at the right answer by knowing and applying the legal order's foundational moral axioms to a specific dispute as part of a narrative chain he terms law as integrity.⁵⁹ However, various people around the world disagree about the constitutive axioms of morality. We can best appreciate how mundane this disagreement is by taking up an example from contracts, one of the boring topics that I teach. There, various understandings of what counts as a promise leads many societies to differ on which the law will recognize and enforce.⁶⁰ Islamic societies, once the center of global finance, refused to enforce obligations to pay excess interest, stimulating reliance on trust partnerships rather than contracts to make good on debt transactions.⁶¹

Moral particularity points to the second reason why Vermeule's reassurances fail to persuade. The argument overlooks the record of how Western thought has treated outsiders. Tradition has been openly bigoted. For all his liberalism that Vermeule decries,⁶² even John Stuart Mill described Anglo-American liberty as a doctrine for "civilized" people. In his famous essay, Mill states that the doctrine leaves "out of consideration those backward states of society in which the race itself may be considered as in its nonage." He adds that until a people are "become capable of being improved by free and equal discussion [...] there is nothing for them but implicit obedience to an Akbar or a Charlemagne if they are so fortunate as to find one."⁶³ White supremacy has persisted and transmuted because it is steeped in Tradition's good sense. To demonstrate this with the very example Vermeule applies Newman's developmental criteria to, Black codes and the deprecation of miscegenation were rooted in an understanding of marriage as an engagement among equals for the rearing of children and well-being of the couple. For example,

⁵⁶ See Casey Const. Change, *supra* note 47, at 17-18 (noting that scholars of the classical natural law tradition like Aquinas counselled "putting great weight on the settled ways of doing things within a particular community. [...] Laws rooted in the mores and patterns of living of a particular people were thought to inspire greater veneration and diligence in adherence; that is, at least compared to laws promulgated by a ruling authority which lacked a firm anchor in communal sentiments, norms, or practices.")

⁵⁷ CGC MONOGRAPH, *supra* note 2, at 4.

⁵⁸ For Vermeule's reference to Dworkin's heuristic, see CGC MONOGRAPH, *supra* note 2, at 106-07.

⁵⁹ RONALD DWORKIN, LAW'S EMPIRE 238-244 (1986) (describing Judge Hercules' process of determination).

⁶⁰ Cf. RESTATEMENT (SECOND) OF CONTRACTS § 1.

⁶¹ See ANTHONY M. ANNETT, CATHONOMICS: HOW CATHOLIC TRADITION CAN CREATE A MORE JUST ECONOMY 105-106 (2000) (citing DAVID GRAEBER, DEBT: THE FIRST 5000 YEARS (2011)).

⁶² For Vermeule's critique of Mill's harm principle, see CGC Monograph, *supra* note 2, at 171 (imputing a U.S. Supreme Court decision invalidating a federal law banning child pornography to it).

⁶³ JOHN STUART MILL, ON LIBERTY: AND OTHER ESSAYS 14-15 (Oxford World Classics ed. 1991)

the first systematic presentation of American marriage law, Joel P. Bishop's 1852 *Commentaries on the Law of Marriage and Divorce*, explained prohibitions on interracial marriage by analogy to an English precedent denying that a countess could marry her footman.⁶⁴ The implication of this analogy – that no legitimate marriage occurs between two people of unequal station – is one of the arguments that the Commonwealth of Virginia cited in its *Loving* brief. There, it cites Roman Catholic Jesuit Priest John LaFarge's 1943 book to argue that the law against interracial unions amounted to a moral prohibition based on the great difference of condition between the groups, including Black people's cultural inferiority, that renders such unions undesirable for child-rearing.⁶⁵ Tradition's conclusions about the cultural inferiority of Blacks, ranging from Thomas Jefferson's 1781 *Notes on the State of Virginia*⁶⁶ to Josiah C. Nott's 1844 *Two Lectures on the Natural History of the Caucasian and Negro Races*⁶⁷ as well as, more contemporaneously, Richard J. Herrnstein and Charles Murray's 1994 *The Bell Curve: Intelligence and Class Structure in American Life*⁶⁸ and reflections on how immigration from the Global South threatens Western civilization,⁶⁹ produce the same outcome that laws against miscegenation sought. Indeed, these views are the very prejudice that allowed many states to dispense with anti-miscegenation laws.⁷⁰

In sum, Tradition's body of conclusions about social phenomena can undermine social peace. This is because those conclusions, formed in specific historical contexts and events, exclude other possibilities developed in other contexts and informed by other events. In sketching the contours of classical revival, Vermeule's CGC Monograph is too glib about this limitation.

⁶⁴ Michael Grossberg, *Physiological Restrictions and the Rise of State Intervention in Matrimony*, 26 AM. J. OF LEGAL HISTORY 198, 201-202 (1982) (citing JOEL P. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE (1852)).

⁶⁵ Brief and Appendix on Behalf of Appellee at 45, *Loving v. Virginia*, 1967 WL 113931 (1967) (citing JOHN LAFARGE, THE RACE QUESTION AND THE NEGRO: A STUDY OF THE CATHOLIC DOCTRINE ON INTERRACIAL JUSTICE (1943)).

⁶⁶ THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 238-243 (Adrienne Koch & William Peden eds., 1993) (arguing that unlike their European counterparts noted in the writings from antiquity, enslaved Blacks are too dull, idle, and sensual for U.S. citizenship).

⁶⁷ THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830–1860 208-238 (Drew Gilpin Faust ed., 1981) (arguing general cultural inferiority of Blacks and Native Americans ruling out intermixing).

⁶⁸ Arguing that intelligence is a predictor of social outcomes and is tied to race, with Blacks being the least intelligent.

⁶⁹ To take one example from an author that a New York Times article described as “gregarious and personable” and “looking like an aging hipster,” see Rob Dreher, *Of Sh*tholes and Second Thoughts*, THE AMERICAN CONSERVATIVE (January 19, 2018), <https://www.theamericanconservative.com/of-shitholes-and-second-thoughts/> (citing former Peace Corps volunteer's observations that west African nations are “shitholes” based on cultural practices of open defecation in public, bureaucratic kleptocracy, and inertia). For the New York Times article so characterizing Dreher, see Elizabeth Zerofsky, *How the American Right Fell in Love with Hungary*, N.Y. TIMES (October 19, 2021), <https://www.nytimes.com/2021/10/19/magazine/viktor-orban-rod-dreher.html>.

⁷⁰ Grossberg, *supra* note 64, at 200 (“The most racially conscious states formally banned such [interracial] unions, the rest made the more common antebellum assumption that private prejudice would accomplish the same result.”)

III. TUTELARY SUBSIDIARITY: PLURALIST COEXISTENCE THROUGH MUNICIPALISM

Lest the foregoing discussion imply that Tradition is irredeemably hostile to pluralist coexistence, this Article turns to some rehabilitation. Like every great legal theory, Vermeule's CGC offers the solution to its problem, albeit one that Vermeule likely rejects.⁷¹ That CGC does so is due to Vermeule's aforementioned genius for articulating the natural law Traditions' breadth, *pace* popular takes such as George F. Will's.⁷² The vastness point came up on the Introduction: Vermeule's theory posits that our legal tradition accepts broad exercises of power to advance the common good limited only by natural law.⁷³ He grasps that the classical legal tradition represents a mere body of principles channeling power and instructing those charged with legal determination in resolving disputes about the use of power. Classically informed judges determining a case should permit appropriate officials to exercise such broad power by reading Tradition's account of structure into constitutional and legislative text. In a word, CGC, in reviving the classical legal tradition, reminds the Anglo-American tradition that using power to advance the common good is proper and what government exists to do.⁷⁴

Vermeule's genius brings us to the Article's main argument. Here, I draw upon such vastness to claim that the Tradition's principle of subsidiarity can secure a place for dissenters even within a Traditionalist legal order. Because this central argument departs from Vermeule's own treatment of subsidiarity in the CGC Monograph,⁷⁵ it must be thoroughly developed. That occurs in four (4) subsections. The first, subsection A, explains what subsidiarity is in the classical legal tradition. The second, subsection B, lays out what subsidiarity would mean for the U.S. constitutional order. Relying on Steven G. Calabresi and Lucy Bickford's 2014 paper, it explains how subsidiarity generally fits into the U.S. constitutional scheme. Then it posits five principles that subsidiarity implies into the U.S. constitutionalism: the right of municipal association, the simplification of dormant commerce clause and preemption doctrines, the municipal norm of regulatory specificity, the replacement of Dillon's rule with Cooley's rule, and the federal and state norm of regulatory generality. In subsection C, the Article concretizes how this subsidiarity structure can advance progressive interests amid live legal controversies about Tradition's effect on dissenters provoked by the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.⁷⁶ It ends, in subsection D, with some observations on how subsidiarity municipalism is a legitimate expression of Tradition in that it is consistent with Tradition's virtue regulation.

⁷¹ See *supra*, notes 21 and 22 and accompanying text.

⁷² *Supra*, note 32.

⁷³ CGC MONOGRAPH, *supra* note 2, at 42 (citing ADRIAN VERMEULE, LAW'S ABNEGATION: FROM ADMINISTRATIVE LAW TO THE ADMINISTRATIVE STATE (2016)).

⁷⁴ On this as a revival, see CGC Monograph, *supra* note 2, ch. 2 generally (surveying history of legal classicism in U.S. law).

⁷⁵ *Id.* at 154-158.

⁷⁶ 597 U.S. 215 (2022).

A. SUBSIDIARITY ACCORDING TO TRADITION: PLURALIST LOCALISM

In chapter 5 of the CGC Monograph, Vermeule engages with subsidiarity toward indicating one way that CGC applies to U.S. constitutionalism. His treatment largely frames the concept as a synonym for the libertarian conception of limited government.⁷⁷ He contrasts this conception, which he characterizes as negative, with a positive version. The positive version provides that limitations on any higher sphere's power are prudential rather than formalistic. By prudential, he means that higher orders remain available to assume localities' functions during what he terms states of exception.⁷⁸ Because he focuses on positive subsidiarity largely as a corrective to libertarianism, he omits the full measure of what subsidiarity affords under the Western legal tradition. This subsection develops what he omits.

In Western legal tradition, subsidiarity has long stood as a natural law⁷⁹ principle of ordering authority according to a preference for proximity, or rule by authoritative bodies closest to people on the ground.⁸⁰ As scholarship has emphasized, it is a principle, not a hard and fast restriction;⁸¹ therefore, it allows myriad applications. Subsidiarity's diverse manifestations are reflected in the dispute among Western theorists about why subsidiarity governs: whether it is a principle born of social reality or efficiency.⁸² But as Maria Cahill's scholarship makes clear, this debate can be framed as Tradition's understanding of subsidiarity versus the contemporary understanding in European Union, North American, and South American constitutional debate.⁸³ Since it is the contemporary view that has produced the most varied manifestations, including applications appearing to contradict subsidiarity's commitment to proximity,⁸⁴ this subsection elaborates what Tradition provides about subsidiarity. As such, it departs from Vermeule's treatment of subsidiarity but follows his broader CGC method of providing modern law's classical genealogy.

Scholars agree that the word "subsidiarity" comes from the Roman Catholic Church's social doctrine, specifically Pope Pius XI's 1931 encyclical

⁷⁷ CGC MONOGRAPH, *supra* note 2, at 154-155.

⁷⁸ *Id.* at 156-157. The distinction between positive and negative subsidiarity also is discussed in Ken Endo, *The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors*, 44 HOKKAIDO L. REV. 652, 642-643 (1992).

⁷⁹ That subsidiarity is a part of the natural law, see John M. Finnis, *Subsidiarity's Roots and History: Some Observations*, 61 AM. J. OF JURISPRUDENCE 133, 135 [hereinafter "Finnis Sub. Roots"] (citing JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980)).

⁸⁰ Maria Cahill, *Subsidiarity as the Preference for Proximity*, 66 AM. J. OF JURISPRUDENCE 129, 130-133 (2021) [hereinafter "Cahill 2021"].

⁸¹ *Id.* at 133-134.

⁸² Finnis Sub. Roots, *supra* note 79, at 141 (2016); Cahill 2021, *supra* note 80, at 131.

⁸³ Maria Cahill, *The Origins of Anti-Subsidiarity Trends in the Regulation of the Family*, 4 INT'L J. OF THE JURISPRUDENCE OF THE FAMILY 85, 89-91 (2013) [hereinafter "Cahill 2013"] (identifying subsidiarity as rooted in pre-existing social ontology recognizing "a collection of naturally occurring primary units for the sake of offering assistance to which the subsidiarity units come into being."); Cahill 2021, *supra* note 80, at 130-31 (explaining confusion about subsidiarity's centripetal or centrifugal explanations and lack of consensus about why it should be).

⁸⁴ Cahill 2021, *supra* note 80, at 130-131.

Quadragesimo Anno.⁸⁵ The scholarly consensus is also that the term “traces its origins as far back as classical Greece, and was later taken up by Thomas Aquinas and medieval scholasticism.”⁸⁶ From these origins, scholarship has identified that, as Tradition has understood it, subsidiarity describes an understanding of how coercive authority should be exercised. It holds that certain social matters should be resolved at the most local and proximate level of authority – units as small as the nuclear family – as a matter of justice. This point about justice is what most distinguishes classical subsidiarity from the contemporary form found in debates about the European Union. For the classical understanding regards local control as the natural order, a reflection of Aristotelian anthropology holding that human beings, as social animals, form natural associations as a conative endeavor.⁸⁷ Such Aristotelian anthropology as later developed by scholastics, most prominently Thomas Aquinas and later commentators on his view such as Luigi Taparelli, came to regard government as another type of human association, one whose function is to be auxiliary support for more proximate associations.⁸⁸

Classical subsidiarity explains why local government exists. It is so that an association of human beings can live the common good as an everyday reality. To express what classical subsidiarity grasps through Vermeule’s metaphor,⁸⁹ a giant may well possess the power to carry out the same functions as a local government. But it cannot *genuinely* rule without knowledge of circumstances that presuppose proximity and immediacy. In other terms, subsidiarity ensures that government serves its ultimate role in natural law theory of securing temporal tranquility⁹⁰ by tying the exercise of government authority to the most natural bonds.

For this reason, classical subsidiarity has conceptualized higher orders—national and state governments—as necessary aspects of localism.⁹¹ This is a point Vermeule also makes,⁹² but again without sufficient elaboration of the specific. For

⁸⁵ E.g., THOMAS C. BEHR, SOCIAL JUSTICE AND SUBSIDIARITY: LUIGI TAPARELLI AND THE ORIGINS OF MODERN CATHOLIC SOCIAL THOUGHT 92 (2019). Accord Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives From U.S. Constitutional Law in Federalism and Subsidiarity*, in FEDERALISM AND SUBSIDIARITY NOMOS LV 126-127 (James D. Fleming & Jacob T. Levy eds., 2010).

⁸⁶ Calabresi & Bickford, *supra* note 85, at 126. See also CHANTAL MILLOL-DELSON, LE PRINCIPE DE SUBSIDIARITÉ 9 (1993); Finnis Sub. Roots, *supra* note 76, at 133-38; BEHR, *supra* note 85, at 98-99.

⁸⁷ Cahill 2013, *supra* note 79, at 90-91.

⁸⁸ BEHR, *supra* note 85, at 102-107 (linking subsidiarity to Taparelli’s use of the Hellenistic term “hypostatic association” for the role of government, a term drawn from Roman legionary battle formations and tactics where forces were connected and interrelated to support the common purpose of the cohort, century, and legion).

⁸⁹ See CGC MONOGRAPH, *supra* note 2, at 154.

⁹⁰ JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 222-224 (1998) [hereinafter “FINNIS AQUINAS”].

⁹¹ Cahill 2013, *supra* note 83, at 90-93.

⁹² CGC MONOGRAPH, *supra* note 2, at 158-159. Recently, Vermeule has more strongly asserted that empire exists to protect what he terms due subsidiarity. See Adrian Vermeule, *Dominus Mundi: the Law, Politics and Theology of Empire: A Catalogue Raisonné*, THE NEW DIGEST (June 18, 2024), <https://thenewdigest.substack.com/p/dominus-mundi-the-law-politics-and> [hereinafter “Vermeule Dominus Mundi”]:

It is a simple mistake, both conceptually and historically, to understand [empire] as intrinsically homogenizing, as hostile to the distinctiveness of peoples (*gentes*),

according to Tradition, strong government exists to sustain local bodies: this is what the term “subsidiarity” means to get at. Again, to borrow his metaphor, the giant is a tutelary matrix for human society, which exists at the local level. To follow Vermeule in explaining this legal principle by reference to Catholic doctrine, the local parish⁹³ presupposes and requires the Universal Church by whose support it can exist and through which it stands as a church rather than a community center. This is because a local parish is both a part of a whole as well as the entirety of the Universal Church where individuals, occupying their bits of space-time, can ever meet.⁹⁴ That last point must be emphasized: local government, say, a police officer, the Post Office, and the DMV, are each both branches of greater reality but also the entire experience of government for many citizens. It is this existential proximity that especially demands them to be socially inclusive so that all citizens can receive the benefit of government.

That classical subsidiarity advances a pluralistic social order is further clarified by one of its precedents: Roman practice of allowing local laws to govern local communities' affairs.⁹⁵ Before elaborating the content of this practice, it is essential to explain why it informs the understanding of classical subsidiarity. Scholarship on subsidiarity's origins has omitted Roman practice because it has elided over what its theorists drew upon to develop the concept. For example, John Finnis cites the third book of Aquinas' *Summa Contra Gentiles* as one of subsidiarity's sources, quoting a passage where Aquinas argues that God respects the free will of human beings even if it should lead them to do wrong in the same way that government authority is bound to respect the free will of people to the same consequences.⁹⁶ The comparison appears to infuse subsidiarity with moralism, so appearing to support Finnis' contention elsewhere that subsidiarity is more a moral than legal principle in that it reflects Aquinas' view that one becomes virtuous by doing, not merely by receiving.⁹⁷ But the structure of the analogy actually points to Aquinas' political pragmatism, the art of administration. Aquinas' explanation of how divine providence is compatible with permitting evil to occur relies upon his contemporaries' familiarity with how government authority had been exercised.

nations in the classical sense (*nationes*), and cultures. Rather, empire rightly understood is itself founded upon appropriate subsidiarity that respects the particular peoples, histories, organic cultures, and political forms determined in particular societies; and empire rightly understood is itself the overarching structure needed to protect local variation and local cultures.

⁹³ Interestingly, its rough equivalent in the Church of England, the parish council, is a microunit of local government in English and Welsh Law. See Cahill 2021, *supra* note 80, at 141 (citing N.W. BARBER, *THE PRINCIPLES OF CONSTITUTIONALISM* (2018)).

⁹⁴ CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Letter to the Bishops of the Catholic Church on Some Aspects of the Church Understood as Communion*, ¶ 10 (May 28, 1992), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_28051992_communionis-notio_en.html?ref=fivebooksforcatholics.com.

⁹⁵ Clifford Endo, *Legal Pluralism in Practice*, in *THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY* 298 (Paul J. du Plessis, Clifford Ando, & Kaius Tuori eds., 2016) [hereinafter “Endo 2016”] (citing Trajan's correspondence with Pliny and the papyrus records of judicial proceedings from the reign of Trajan to show that Roman law authorized local polities to exercise legislative authority over particular landscapes).

⁹⁶ FINNIS AQUINAS, *supra* note 90, at 138.

⁹⁷ *Id.* at 147.

What they would have been familiar with was Roman practice, a clear influence on Aquinas' thinking that can be determined not only by reference to the intellectual climate in which he wrote⁹⁸ but also forensically. To marshal the forensic evidence, in Aquinas' *De Regno*, his sole tract on government,⁹⁹ he argues based on Roman examples. For instance, he warns that monarchy is tempted to tyranny by citing incidents discussed in Sallust's *Bellum Catilinae*.¹⁰⁰ Elsewhere, he cautions against worse tyranny by further citing Tarquin the Proud and Domitian.¹⁰¹ Especially in view of John Finnis' observation that contemporary events "leave almost no palpable trace in Thomas's writings,"¹⁰² Aquinas' reliance on Roman practice in his government theory renders such essential to understanding his legal thought. For it sources what another scholar describes as one of his principles: that government and legislation is more an art than ethics, an issue of practice, not theory, particular in nature, and contingent on events.¹⁰³

Similarly, Finnis' engagement with Luigi Taparelli's treatise that informs *Quadragesimo Anno* omits Roman practice as its source.¹⁰⁴ Amply citing its passages, Finnis frames Taparelli's discussion of subsidiarity as a normative ethical-social theory¹⁰⁵ but omits the historical facts upon which the discussion is based. As review of footnotes in Taparelli's treatise establish, some of these facts are examples from Rome and Athens showing the necessity of dividing society into lesser consortia.¹⁰⁶ They also include historians' sense that during the fall of imperial Rome, cities survived as bodies of public order based on their origins as natural human associations.¹⁰⁷

Having established that understanding Roman practice unlocks subsidiarity, this subsection now turns to elaborating its content. At a broad level, the Roman Empire "had a clear practice of conceding so-called 'autonomy' to conquered populations. In Greek and Roman practice, 'autonomy' consisted of the right of a politically consisted community 'to use its own laws' in regulating private-law affairs among those dwelling in its territory."¹⁰⁸ "Local communities held an essential position in the government of the Roman empire: most of the daily business of governing was left to the hands of magistrates of the local communities[.]"¹⁰⁹ Governors, representatives of the imperial order within such communities, delegated administration to local government where it was found and encouraged local government where there was none.¹¹⁰ Local government was a presupposition

⁹⁸ THOMAS GILBY, THE POLITICAL THOUGHT OF THOMAS AQUINAS xxvi, 2 (1958) [hereinafter "GILBY POLY. THOUGHT"] (contending that the revival of Roman Law was among the events and ideas that Aquinas contended with).

⁹⁹ FINNIS AQUINAS, *supra* note 90, at 140.

¹⁰⁰ DE REGNO, I, ch. 5, 31, 32, and 33.

¹⁰¹ *Id.* at ch. 7, 49.

¹⁰² FINNIS AQUINAS, *supra* note 90, at 3.

¹⁰³ GILBY POLY. THOUGHT, *supra* note 98, at xxiv.

¹⁰⁴ Finnis Sub. Roots, *supra* note 76, at 139-140.

¹⁰⁵ *Id.*

¹⁰⁶ BEHR, *supra* note 85, at 205, fn. 3.

¹⁰⁷ *Id.* at 208, fn. 8.

¹⁰⁸ Endo 2016, *supra* note 95, at 284.

¹⁰⁹ Saskia T. Roselaar, *Local Administration*, in THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY 124 (Paul J. du Plessis, Clifford Ando, & Kaius Tuori eds., 2016)

¹¹⁰ ANDREW LINTOTT, IMPERIUM ROMANUM: POLITICS AND ADMINISTRATION 54 (1993).

of the Roman model of provincial authority, one that gave governors limited duties and jurisdiction.¹¹¹ For the various peoples living within the empire, their everyday rights were determined by the *civitas* where they were born, a term encompassing what we call a town, territory, or group of rural communities.¹¹² Roman law referred to this idea as the law's personality.¹¹³

This principle of localism extended to jurisdiction, or the question of who was to administer legal order. This produced variety on which matters a governor administered toward centralizing Roman authority and which a governor deferred to local communes.¹¹⁴ The variety produced different jurisdictional practices. For example, Roman Sicily was governed by a gubernatorial decree that allowed use of Sicilians' local law for disputes arising between members of the same *civitas*.¹¹⁵ For Greeks within Roman Asia, Roman Governor Scaevola's edict of the first century before the common era allowed them to sue another according to their own laws, so sorting out a jumble of inconsistent practices.¹¹⁶ Roman Cyrene, by contrast, was governed by gubernatorial edicts subjecting even local disputes to Roman officials' determination, a reality suggesting the use of Roman law.¹¹⁷ The practice of more gubernatorial involvement in Cyrene than in other provinces likely was because of Cyrene's smaller size relative to larger cities in other provinces,¹¹⁸ an apparent state of exception inviting a higher order's more active management.

Localism was how the Roman empire governed as a matter of crude pragmatism since "ancient states generally lacked the infrastructural power to universalize their metropolitan culture."¹¹⁹ In addition, a cultural consideration informed the practice: governors and their staff also were "not conditioned to believe that they should carry out the comprehensive regulation of the life of the people subject to them."¹²⁰ Since Roman law recognized the imperial order's power of intervention,¹²¹ local deference must be understood as a matter of constitutional principle. To put it differently, because the practical necessity was so obvious as a matter of human limitation, it amounted to a political preference foundational to maintaining peace and order in vast and diverse territory.¹²²

¹¹¹ *Id.* at 129.

¹¹² *Id.* Clifford Endo notes how *civitas* also can mean a juridically constituted community. See Endo 2016, *supra* note 95, at 289.

¹¹³ BARRY NICHOLS, AN INTRODUCTION TO ROMAN LAW 57 (1962); José Luis Alonso, *Constitutio Antoniniana in the Eastern Empire*, in LAW IN THE ROMAN PROVINCES 56 (Kimberly Czajkowski & Benedikt Eckhardt eds., 2020).

¹¹⁴ LINTOTT, *supra* note 110, at 57.

¹¹⁵ *Id.* at 59.

¹¹⁶ *Id.* at 62-63.

¹¹⁷ *Id.* at 64-65.

¹¹⁸ *Id.* at 65.

¹¹⁹ Clifford Ando, *Pluralism and Empire: From Rome to Robert Cover*, 1 CRITICAL ANALYSIS OF LAW: AN INTERNATIONAL & INTERDISCIPLINARY LAW REVIEW 1, 2, & 9 (2014) [hereinafter "Endo 2014"].

¹²⁰ LINTOTT, *supra* note 110, at 54.

¹²¹ *Id.* at 132. See also FRITZ SCHULZ, PRINCIPLES OF ROMAN LAW 163 (1936).

¹²² NICHOLS, *supra* note 113, at 9 (arguing that the Roman Empire also cultivated and managed difference "toward constraining the social and economic activity of conquered populations within specific geographical parameters")

To state local deference as a preference must not obscure its status as law, however. It is articulated in Gaius' Institutes, the only surviving legal textbook from antiquity.¹²³ The law of local deference also stated the basis for central authority based on its principle of two orders. Gaius' Institutes states that Roman subjects are governed both by particular civil law, which they establish for themselves or their specific *civitas*, and the *ius gentium*, based on principles common to humankind and so universally observed.¹²⁴ Since Gaius' statement was published in the common era's second century, centuries after the apex of Roman territorial conquest, scholarship assumes it reflects long-developed practice¹²⁵ and is firmly established in the era's imperial thinking.¹²⁶

More important than its antiquity is its substance. The legal distinction between *ius civile* and *ius gentium* produced local deference on private law matters—family law and matters relating to a specific community—and centralized, Roman law governing relations between members of the empire.¹²⁷ Some examples from peripheral, local communities help characterize which fell into which. José Luis Alonso has observed that for the 250 years spanning its annexation into Rome and extension of full citizenship to its members, Roman Egypt was governed by a constitution consistently endorsing the use of local private law in disputes involving “peregrines,” or non-citizen locals.¹²⁸ As examples of how this applied, Alonso mentioned Roman courts' wholesale application of local laws despite their incompatibility with Roman legal principles. Conveying the extent to which this was a strong practice of localism requires full quotation:

In the absence of autonomous courts, peregrine private law would not have kept its hold in Egypt without the consistent endorsement of the Roman jurisdiction. The surviving court documentation confirms this assumption. The usual term “tolerance” is insufficient here. Peregrine law was not merely tolerated but unfailingly applied by the Roman courts, even when it challenged the most basic Roman principles. And thus: (a) sibling marriage; practices close to (b) *materna potestas* and (c) maternal

¹²³ *Id.* at 8, 34-35.

¹²⁴ *Id.* at 8.

¹²⁵ *Id.*

¹²⁶ See *supra*, note 95 (citing Trajan's correspondence and papyrus records of judicial proceedings during Trajan's reign).

¹²⁷ NICHOLS, *supra* note 113, at 57-58 (noting Roman deference to local laws on family and succession matters, and noting *ius gentium* governing interactions between foreigners and Roman citizens and between foreigners). See also SCHULZ, *supra* note 121, at 145-47 (explaining private law individualism contained in Roman liberty); LINTOTT, *supra* note 110, at 156-57 (noting various examples throughout Roman empire of family law deference); FRANCIS DE ZULUETA, THE INSTITUTES OF GAIUS: PART II: COMMENTARY 12-13 (1953) (noting that *ius gentium* was a common law for all Roman subjects regardless of their *civitas*, especially a common commercial law based on the common sense and practice of the Mediterranean world).

¹²⁸ José Luis Alonso, *The Status of Peregrine Law in Egypt: “Customary Law” and Legal Pluralism in the Roman Empire*, 43 JOURNAL OF JURISTIC Papyrology 351, 352-54 (2013) [hereinafter “Alonso 2013”]; José Luis Alonso, *Constitutio Antoniniana in the Eastern Empire*, in LAW IN THE ROMAN PROVINCES 44, 56 (Kimberly Czajkowski & Benedikt Eckhardt eds., 2020)

guardianship; (d) succession in stirpes in the female line; (e) contractual mortis causa arrangements; (f) *divisio parentis inter liberos* covering the whole inheritance: all this persisted under Roman rule among peregrines, and was, as long as Romans were not involved, accepted as fully valid by the Roman administration.¹²⁹

As another example from Cédric Brélaz's scholarship, the Council of Hierapolis, a local community in Roman Asia that never attained the status of a free city, was permitted to regulate the law enforcement activities of certain local officials called *paraphylakes*. As these officials "were in charge of patrolling the countryside and preventing misconducts and crimes in the rural territory belonging to cities,"¹³⁰ they were officially part of the imperial order protecting public security. Despite this, that local council was allowed to specify, under penalty of fines payable to its treasury and sanctions such as the deprivation of all local honors, which forms of material support such officials could request from villagers. The local council enacted such regulation to prevent abuse that villagers had complained about to Roman authorities, demonstrating imperial sanction of the local measure.¹³¹

To demonstrate that both the practice and law of local deference are rooted in the Aristotelian anthropology driving classical subsidiarity, I here cite three sources. The first two are Barry Nichols' 1962 introduction to Roman Law professing to "draw out the fundamental assumptions and distinctions of Roman law"¹³² and H.F. Jolowicz's 1965 study of Roman law claiming to supplement legal textbooks by providing students with "everything they need to know about Roman law."¹³³ Nichols observes that the first principle of Gaius' Institutes distinguishing between "man-made law, which is particular to one state, and natural law, which is universal" is substantially the same proposition that Aristotle propounded.¹³⁴ Jolowicz claims that Gaius' first principle articulates a stream of Roman juridical thought also derived from Aristotelian theory: the same distinction between natural law that is universal and so common to all humankind and "man-made" law governing matters where, Nature being indifferent, a community was free to lay down its own rules.¹³⁵ Like Nichols,¹³⁶ Jolowicz's discussion focuses on the natural law rather than the civil law. And he similarly contends that the Institutes' foundational principle is "almost in the words of Aristotle."¹³⁷ As for the third source, Peter Stein more recently observed that the Romans' "philosophy of law was borrowed from the Greeks," as, unlike Greek speculation about the nature of law and its place in society, Roman law was far more interested in rules and proceedings.¹³⁸ From all

¹²⁹ Alonso 2013, *supra* note 128, at 352-353. Lintott also notes Roman tolerance of "endogamy, especially brother-sister marriage – a fundamental breach of [Roman] law and tradition." LINTOTT, *supra* note 110, at 157.

¹³⁰ Cédric Brélaz, *Roman Criminal Law and Procedure in Asia Minor*, in *LAW IN THE ROMAN PROVINCES*, *supra* note 113, at 159.

¹³¹ *Id.* at 164-166.

¹³² NICHOLS, *supra* note 113, at v.

¹³³ H.L. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE ROMAN LAW* xvii (1965).

¹³⁴ NICHOLS, *supra* note 113, at 54-55.

¹³⁵ JOLOWICZ, *supra* note 133, at 103-04.

¹³⁶ NICHOLS, *supra* note 113, at 65-56.

¹³⁷ JOLOWICZ, *supra* note 133, at 104.

¹³⁸ PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* i (1999).

this, we can conclude that Roman law's pluralist localism comes from Aristotle's thought.

The strength of pluralist localism within the classical legal tradition is evidenced by its most begrudging form—Christendom's practice with Jews. Even in a society explicitly organized to produce Christian faithful¹³⁹—a notion in great tension with religious dissent—Roman subsidiarity can be discerned. The Papal States, the portion of Christendom most committed to Christendom's aim, nonetheless embraced a legal doctrine allowing Jewish outsiders to maintain some form of autonomous communities under administrative protection, including a right to maintain synagogues.¹⁴⁰ This was a part of Christendom's commitment to maintaining Roman practice hailing from its inception.¹⁴¹ Of course, the rank discrimination¹⁴² and sordid record of hostility and pogroms that also characterize Christendom's relationships with Jews¹⁴³—ones absent from classical Rome¹⁴⁴—serve as a reminder of how disruptive prejudice can be to social peace, as noted at the end of Section II. The problem of violence seems to stem from the begrudging aspect. Christendom only tolerated Jews based on a respect for precedent with the hope of their conversion, either immediately or during the final judgment,¹⁴⁵ rather than Roman pragmatic pluralism.¹⁴⁶ However fatuous it may be to reduce centuries of history to a single proposition, the comparison to imperial Rome shows that mere difference does not foment violence. Rather, a resistance to pluralist coexistence appears to do so, as the treatment of minorities is the acid test of democracy.¹⁴⁷ So, Christendom's treatment of Jews also serves to reinforce how the embrace of subsidiarity, and not the mere incantation of precedent, is essential to social peace.

B. THE STRUCTURE OF CLASSICAL SUBSIDIARITY: FIVE IMPLICATIONS FOR U.S. CONSTITUTIONALISM

This subsection addresses classical subsidiarity's mechanics and their implications for U.S. constitutionalism. It offers a framework for domesticating subsidiarity into U.S. constitutionalism so that municipalism might advance pluralist coexistence.

¹³⁹ See, e.g., Colin Morris, *Christian Civilization, in THE OXFORD HISTORY OF CHRISTIANITY* 208 (John McManners ed., 1993) (describing Christendom as “the conscious elaboration of a programme which was to bring mankind under the law of Christ.”).

¹⁴⁰ EDWARD A. SYNAN, *THE PEOPLES AND THE JEWS IN THE MIDDLE AGES* 19 (1965); SOLOMON GRAYZEL, *THE CHURCH AND THE JEWS IN THE XIIITH CENTURY. VOLUME II: 1254-1314* 3-5 (Kenneth R. Stow ed., 1989); SHLOMO SIMONSOHN, *THE APOSTOLIC SEE AND THE JEWS, HISTORY* 39 – 45 (1991). That is derives from Roman practice, see LINTOTT, *supra* note 110, at 158 (noting that Romans accepted Jews as a nation with their own religion and forms of private law until the fourth century C.E.).

¹⁴¹ SIMONSOHN, *supra* note 140, at 38-41 (observing imperial roots of Christendom's protection of Jews).

¹⁴² *Id.* at 7-8 (describing various civil restraints on Jews' rights such as prohibiting mixed marriages and the denial of their right to admit evidence).

¹⁴³ SYNAN, *supra* note 140, at 1.

¹⁴⁴ *Id.* at 18-19.

¹⁴⁵ SIMONSOHN, *supra* note 140, at 4.

¹⁴⁶ See *supra* notes 108 through 122 and accompanying text.

¹⁴⁷ THOMAS GILBY, *BETWEEN COMMUNITY AND SOCIETY: A PHILOSOPHY AND THEOLOGY OF THE STATE* 8 (1953).

The argument here first identifies how subsidiarity fits into the general U.S. constitutional scheme, drawing on Steven G. Calabresi and Lucy D. Bickford's 2014 paper.¹⁴⁸ It then builds on their argument by positing five principles that classical subsidiarity incorporates into U.S. constitution, elaborating how each is grounded in the Roman localism discussed above Section III.A.¹⁴⁹

At a high level of generality, subsidiarity accounts for some basic features of U.S. federalism. I agree with Calabresi and Bickford that George A. Bermann's contention during debates about including subsidiarity in the European Union's constitution¹⁵⁰ is wrong.¹⁵¹ Contrary to Bermann's observation, subsidiarity does have a normative role in U.S. constitutionalism; it explains how popular sovereignty endures through the paradox of omnipotent limited governments.¹⁵² Although U.S. constitutional law has not used the term subsidiarity, as Bermann observed,¹⁵³ it better accounts for the operation of U.S. government's federalist structure for reasons Calabresi and Bickford elaborate.¹⁵⁴ They amply lay out how constitutional enforcement through judicial review and the Rehnquist Court's commerce clause, dormant commerce clause, preemption, federal jurisdiction, and conflicts of laws jurisprudence are how the U.S. constitutional system has accommodated subsidiarity demands.¹⁵⁵ Here, we can summarize the gist. Consistent with the dual federalism ostensibly established in the constitutional text,¹⁵⁶ each governmental sphere possesses absolute power within its role. But the way U.S. constitutionalism has ensured that such raw power advances the general welfare is through checks-and-balances coordination.¹⁵⁷ The emergence of this coordination, denominated as the cooperative federalism that emerged during New Deal and Great Society policymaking,¹⁵⁸ is archetypal classical subsidiarity. To take

¹⁴⁸ See *supra*, note 85.

¹⁴⁹ See *supra*, notes 108 through 122 and accompanying text.

¹⁵⁰ George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 70 COLUM. L. REV. 331, 403-404 (1994) (arguing that subsidiarity has little role in U.S. constitutional order.).

¹⁵¹ See Calabresi & Bickford, *supra* note 85, at 127 (explaining disagreement with Bermann's argument).

¹⁵² See *id.* at 145.

¹⁵³ See *supra*, note 150.

¹⁵⁴ Calabresi & Bickford, *supra* note 85, at 127-128. Accord Daniel Halberstam, *Federal Powers and the Principle of Subsidiarity*, in GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW 35 (Vikram David Amar & Mark V. Tushnet eds., 2009).

¹⁵⁵ *Id.* at 137 – 159.

¹⁵⁶ Michael S. Grieve, *Federalism*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 437-438 (Mark Tushnet, Mark A. Graber, & Sanford Levison eds., 2015)

¹⁵⁷ See, e.g., Joshua D. Sarnoff, *Cooperative Federalism, The Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 212-214 (1997) (noting that federal legislators enact schemes of cooperative federalism because state implementation may produce better outcomes, including overcoming political resistance and producing better tailored regulation).

¹⁵⁸ See, e.g., Philip J. Weiser, *Towards A Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668 – 670 (2001) (citing New Deal's Aid to Families with Dependent Children and Great Society's Medicaid schemes as sign points of cooperative federalism, which envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law).

one example, the history of U.S. affordable housing policy serves as a microcosm of U.S. constitutional development from dual to cooperative federalism. For that history is a movement from the federal government owning and operating such housing to supporting local bodies doing so and then to embracing a system where the higher orders of government subsidize private developers to do so with funding and under standards administered by local bodies.¹⁵⁹ This movement has reflected the reality that government operates locally—there is scarcely any other way in so vast a polity.¹⁶⁰ But local government, in turn, is powerless to be effective without a giant’s mediation, support, and protection. From this comes civics’ description of the U.S. federalist order as one where local government primarily provides services and carries out operations and state and federal government primarily funds and regulates with coordinated overlap.¹⁶¹ As sketched above in Section III.A, this basically corresponds to the complementary roles of the imperial and provincial governments under the Roman constitution.¹⁶²

Such pragmatic operation helps us to see how classical subsidiarity explains the endurance of the federalist order under the 1787 U.S. Constitution. It is important to remember the current constitutional order is not the United States’ first. The order under Articles of Confederation was the first and is conventionally understood to have failed because it left the national government unable to protect local governments.¹⁶³ To put this in terms of both Vermeule’s and Casey Conor’s more recent arguments,¹⁶⁴ the problem with the United States’ first attempted constitutional order was its inability to ensure that the spheres worked together toward the common good. Without omnipotent spheres mediating and checking warring factions in a transcontinental polity,¹⁶⁵ the social tranquility that government exists to ensure is unachievable.¹⁶⁶

¹⁵⁹ MAGGIE McCARTY, LIBBY PERL & KATIE JONES, CONG. RSCH SERV., RL34591, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY 1–10 (2019), <https://crsreports.congress.gov/product/pdf/RL/RL34591>.

¹⁶⁰ See, e.g., Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1504, 1507-1510 (1987) (arguing that U.S. constitutional framers believed that republican government can occur only in small jurisdictions because legal compliance depends on voluntary compliance presupposing governmental units small and close to the people and that public virtue can only be cultivated in local communities as it depends on the natural sentiment of benevolence.)

¹⁶¹ See, e.g., GERALD A. FISHER, LOCAL GOVERNMENT LAW: A PRACTICAL GUIDEBOOK FOR PUBLIC OFFICIALS ON CITY COUNCILS, COMMUNITY BOARDS, AND PLANNING COMMISSIONS 3-10 (2021); *State and Local Government*, THE WHITE HOUSE, <https://bidenwhitehouse.archives.gov/about-the-white-house/our-government/state-local-government/> (last visited March 15, 2025).

¹⁶² See *supra*, notes 127 through 131 and accompanying text.

¹⁶³ This is the conclusion in a recent study of the decline and fall of the Articles of Confederation. See GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION 8 (2017).

¹⁶⁴ Vermeule Dominus Mundi, *supra* note 92 (arguing that empire exists to provide universal peace); Casey Const. Change, *supra* note 47, at 8-9 (citing John Finnis, *Limited Government*, in HUMAN RIGHTS & COMMON GOOD 83-101 (2011) in arguing that classical legal tradition regards excessively limited government unable to address private abuses as a threat to the common good).

¹⁶⁵ Federalist No. 10.

¹⁶⁶ See *supra*, note 90.

Applying classical subsidiarity to the U.S. constitutional order implies five principles correcting or clarifying prevailing deviations from the classical legal tradition in U.S. constitutionalism. They are as follows: (1) people enjoy a foundational right to local government rooted in their right of association; (2) municipal government governs local affairs; (3) subsidiarity imposes on municipalities and municipal officials a duty to regulate based on transparent, publicly declared findings of local facts and circumstances; (4) the interpretation of municipal charters and other putative sources of municipal power should be according to Cooley's rule instead of the prevailing Dillon's rule; and (5) higher orders' powers should be understood as broad principles of order and justice consistent with lower bodies' adaptation to particular circumstances. The following paragraphs elaborate the content of each in opposition to its antithesis.

First: The Right of Municipal Association. Against the prevailing notion that local government exists by the grace of State government,¹⁶⁷ classical subsidiarity empowers communities to form municipalities by implying a right of municipal home rule into U.S. constitutionalism. The principle empowers communities to form municipalities even in jurisdictions lacking a formal mechanism or legislative scheme for such. This right derives from the first principle of Gaius' Institutes, specifically the right of a *civitas* to form its own law. To express this in more familiar terms, the right to municipal home rule is an extension of association rights. As we saw above in Section III.A, Western legal theory understands municipalities as collections of families, the right to self-govern being rooted in pre-political anthropology.¹⁶⁸

When applied to U.S. constitutionalism, the classical legal tradition's principle of subsidiarity cleanses the order of ideology and roots it in human practice. As might be expected of a form rooted in free association, local government is anterior to any other form of government in the U.S.¹⁶⁹ This is one reason why it remains odd to conceive of self-governing local communities as depending upon, or deriving consent from, States to exist, a view that became dominant only in the twentieth century.¹⁷⁰ Saying "administrative subdivision" to convey some dependence on state authority to exist is a mistake that subsidiarity cures. As elaborated below in the fourth principle's discussion of Cooley's rule, classical subsidiarity supplies the correct understanding of how municipalities are administrative subdivisions of higher orders. Since *all* government exists to advance the common good, all

¹⁶⁷ See, e.g., FISHER, *supra* note 161, at 9-10 (2021) (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) and *City of New York v. State of New York*, 86 NY2d 286 (N.Y. 1995) in explaining that local governments are understood as extensions or subdivisions of state government structure and subject to state power delegation.)

¹⁶⁸ See *supra*, notes 88 and 89 and accompanying text. See also Erika Arban, *An Intellectual History of Federalism: The City and the "Unit" Question*, in CITIES IN FEDERAL CONSTITUTIONAL THEORY 16-19, 25-26 (Erika Arban ed., 2022) (discussing Swiss theologian Heinrich Bullinger covenant theory of federations and German Calvinist theologian Johannes Althusius' theory of politics as the art of associating through families, collegia, cities, provinces, and the commonwealth and their influences on U.S. and continental European federalism).

¹⁶⁹ See *infra*, note 188.

¹⁷⁰ See OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 81-85 (3d. Ed. 2009) (explaining the doctrine of inherent home rule that some states had adopted and its near universal rejection by the 1930s).

serve the same basic ends. And so, consistent with Vermeule’s argument,¹⁷¹ higher government orders such as states have a role in the regulation of local affairs. But local government is the form best suited to the ordinary regulation of such affairs based on the anthropology discussed above in Section III.A.¹⁷² This fit makes it part of what is due to people in specific communities.¹⁷³

Second: The Presumption in Favor of Municipal Regulation of Local Affairs. Against the prevailing doctrines of the dormant commerce clause¹⁷⁴ and field preemption,¹⁷⁵ classical subsidiarity settles that municipal government is the proper organ of local regulation consistent with the first principle of Gaius’ Institutes. The most significant implication of this is not for the municipality’s powers as such but rather federal and state constitutional law. This principle mandates simplified and narrowed doctrines of dormant commerce clause and preemption that focus on sphere.

Explaining this change requires a brief overview of their prevailing understandings as applied to municipalities. Unless Congress approves the enactment or it is one where the locality seeks to favor its residents for its own programs or for access to government-owned businesses, dormant commerce clause outcomes turn on whether a local government is discriminating against foreigners. If yes, then an enactment is largely suspect. If no, then the enactment will be upheld unless the federal government has a more compelling interest, a test that has produced unpredictable outcomes.¹⁷⁶ As for field preemption, the doctrine holds that any area where state authority dominates precludes local regulation on the same. As a recent example illustrating the prevailing misunderstanding, a state trial court nullified New York City ordinances collectively providing for a local housing subsidy for shelter residents on the basis that state law indicated exclusive regulation of social services.¹⁷⁷ It did so despite the entire Anglo-American tradition of public assistance requiring local officials at the lowest level to provide assistance to those in need,¹⁷⁸ a tradition reflected in the text of New York’s own public assistance scheme.¹⁷⁹

¹⁷¹ See *supra*, notes 77 and 78 and accompanying text.

¹⁷² See *supra*, notes 87 and 88 and accompanying text. See also Maria Cahill & Garry O’Sullivan, *Subsidiarity and the City: The Case for Mutual Strengthening*, in CITIES IN FEDERAL CONSTITUTIONAL THEORY 58 – 61 (Erika Arban ed., 2022) (discussing Daniel Weinstock’s expertise argument for local autonomy and its relationship to subsidiarity’s efficiency principle).

¹⁷³ Cf. *infra*, note 323 (Ulpian’s principle).

¹⁷⁴ This prohibits state and local laws that place an undue burden on interstate commerce on the basis that the U.S. Constitution grants Congress the power to regulate commerce among the states. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 462 (6th ed. 2019).

¹⁷⁵ Field preemption refers to the judicial determination that Congress or a state legislature has expressed an intent that the federal or state government should exclusively regulate an area. See *id.* at 440 for the federal version. For an overview of the state version, see REYNOLDS, *supra* note 170, at 140-144.

¹⁷⁶ CHERMERINSKY, *supra* note 174, at 486 – 92.

¹⁷⁷ *Vincent v. Adams*, 2024 WL 3635003 at *2 - *3 (N.Y. Co. Sup. Ct.)

¹⁷⁸ WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 9-12 (6TH ED. 1999) (describing 1536 Henry VIII’s Poor Law and its successor, the 1601 Elizabethan Poor Law, and noting that it “provided the pattern for the poor laws in the American colonies, in the original thirteen states, and in the subsequent ones as they entered the union.”)

¹⁷⁹ N.Y. SOCIAL SERV. L § 62[1] (McKinney’s 2024): “Responsibility for public assistance and care. 1. Subject to reimbursement in the cases hereinafter provided for, each public

Working in tandem with the requirement of factual specificity noted below, classical subsidiarity simplifies the inquiries to authorize municipal regulation of any local matter. The obvious exceptions would be where local authority clearly infringes upon some other municipality or encroaches upon the common spaces that higher authorities must mediate for the common good. And even in such exceptional situations, classical subsidiarity cautions the law to allow a higher order to regulate only that aspect of a local matter causing broader difficulties. As such, there would be no area of the law over which a municipality would lack authority as local affairs touch upon everything. Only the scope of its authority would be subject to judicial determination and refinement.

The general framework raises the question of what counts as a local matter. This subsection submits that the distinction largely tracks Roman law's understanding of *ius gentium* versus *ius civile*. Implying such Roman wisdom into the U.S. constitutional scheme crystallizes the basic distinction between commercial versus social regulation. As state constitutions' home rule texts state,¹⁸⁰ matters solely affecting people resident, things situated, and phenomena solely occurring, within municipal limits, are likelier to be social than commercial. Thinking of them as local is consistent with Roman law's local deference on family law and centralization of commercial matters.¹⁸¹ Understanding the law in such terms, courts also can resolve disputes about commercial municipal regulations raising issues of infringement and encroachment in such a way as to preserve local rule. Consistent with the role of determination central to CGC, classical subsidiarity authorizes a court to require that a municipality fashion an accommodation for non-residents to avoid infringement and encroachment, like the United States Supreme Court required of the federal government with the contraception mandate to avoid a free exercise problem.¹⁸²

Third: Specificity as a Formal Requirement. Against the conventional rational basis rule that upholds regulation based on any conceivable sound reason and not actual stated ones,¹⁸³ classical subsidiarity's deference to localities comes at a cost: a formal requirement enabling higher bodies to confirm local regulation's propriety. The formal requirement is that municipalities regulate¹⁸⁴ based on published

welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself.”

¹⁸⁰ See, e.g., N.Y. STATE CONST., ART. IX, § 2(c)(10) (authorizing local government to adopt laws relating to the government, protection, order, conduct, safety, health and well-being of persons or property within the municipality).

¹⁸¹ See *supra*, notes 127 through 131 and accompanying text.

¹⁸² *Zubik v. Burwell*, 578 U.S. 403, 408 (2016).

¹⁸³ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-488 (1955) (upholding state law regulating activities of opticians based on speculation about what the state legislature might have concluded). See also *Carolene Products*, *supra* note 13, 304 U.S. at 152-153 (stating that regulatory legislation affecting ordinary commercial transactions is to be upheld unless “in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators”).

¹⁸⁴ I use the term “regulate” to encompass all possible forms through which local government can exercise power, whether legislation or executive orders, memoranda, or directives by local officials such as mayors, district attorneys, or administrative agencies. I seek to be comprehensive to avoid the argument here being bogged down by how the U.S. concept of separation of powers applies to the classical legal tradition. That is a matter beyond the

findings of facts about a local community's specific regulatory circumstances. Such statements serve two purposes. The first is that it reflects the actual exercise of subsidiarity, which is circumstantial. As one scholar has articulated this aspect,

[s]ubsidiarity by its very terms refers to the need for more contextual, fact-specific decisions, and it necessarily works, if at all, as much more through rhetoric and politics as through formal doctrine. The detailed criteria by which subsidiarity operates are not suited to abstract reasoning ex ante, but instead need to be worked out over time, and the conclusions to which it leads will always be contextual and dynamic, containing the fluidity and flexibility of [practical judgment].¹⁸⁵

Second, factual specificity also circumscribes the limits of municipal regulation, ensuring that it stays within the limits imposed by higher spheres' regulatory remit. Such limits are what the doctrines of the dormant commerce clause and preemption appear to capture. To concretize this, where a municipality regulates a matter based on its declared empirical effect on a local affair, there can be no genuine concern that the regulation encroaches on other communities' rights, or infringes on matters that are to be mediated by a higher order. Specified particular facts ensure that the municipality is regulating for the benefit of the common good rather than usurping a function more properly exercised by a higher order. As such, it follows the Roman principle that *ius civile* – a community's rules regulating local affairs – be published, as was the case with Roman law's foundational Twelve Tables at the demand of commoners.¹⁸⁶

Fourth: Cooley's Rule as the Standard for Interpreting Municipal Authority. Against *Dillon's Rule*, the prevailing standard for interpreting the scope of municipal authority, classical subsidiarity promotes the more accurate formulation found in *Cooley's Rule*. Explanation again requires an overview of the current understanding. In the study of local government, *Dillon's Rule* refers to a doctrine that has served two purposes. First, it has reinforced the notion that local governments have no inherent power, the prevailing doctrine within the U.S. legal systems¹⁸⁷ wholly premised on the ahistorical notion that local governments are creatures of States¹⁸⁸ discussed above with the second principle. Second, it reinforces

scope of this Article but one that Vermeule weighs in on. See CGC MONOGRAPH, *supra* note 2, at 47; Adrian Vermeule, *The Rule of Law Without Separation of Powers: Legality in the Classical Tradition* (Harv. L. Sch. Pub. L. Working Paper, Paper No. 23-29, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4587125#:~:text=On%20the%20classical%20view%2C%20no.general%20welfare%20or%20common%20good.

¹⁸⁵ Cahill & O'Sullivan, *supra* note 172, at 57 (quoting Paolo Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. OF INTL L. 38, 79 (2003)).

¹⁸⁶ See BARRY NICHOLS, AN INTRODUCTION TO ROMAN LAW 15 (1962) (explaining that Twelve Tables, early source of Roman civil law, was published in response to Plebian demand toward ensuring that the law not remain the personal knowledge of Patrician magistrates). That Romans had a general practice of publishing statutory law, see ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 3 (1999).

¹⁸⁷ REYNOLDS, *supra* note 170, at 83 (2009) ("The doctrine of inherent home rule has now been clearly rejected in almost all U.S. jurisdictions and may thus be considered of little contemporary significance.")

¹⁸⁸ *Id.* at 168 (citing EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, VOL. 1

such entrenchment by limiting local governments to exercising only those powers (1) expressly conferred by the sole sources of local government authority under prevailing doctrine such as state constitutions, statutes, or home rule charters, (2) necessarily or fairly implied in the expressly granted powers, or (3) essential to what the municipality or quasi-corporation was established for.¹⁸⁹

By contrast, *Cooley's Rule* provides an equally broad statement of municipal power rooted in subsidiarity. For it provides that

[i]t is axiomatic that the management of purely local affairs belongs to the people concerned, not only because of being their own affairs, but because they will best understand, and be most competent to manage them. The continued and permanent existence of local government is, therefore, assumed in all the state constitutions, and is matter of constitutional right, even when not in terms expressly provided for. It would not be competent to dispense with it by statute. [...T]he local community is entitled to local government, [but] it cannot claim, as against the State, any particular charter or form of local government.¹⁹⁰

That municipal power is rooted in localities' superior competence over local affairs is reflected in other limits that *Cooley* prescribes on states' powers: the inability to coerce localities in matters of purely local convenience, their powerlessness to appoint officers to take charge of local affairs, and the illegality of state law authorizations to tax residents over matters not of local interests or to regulate individuals outside the municipality.¹⁹¹ In a word, *Cooley's Rule* is one of plenary authority within the local sphere, consistent with the discussion above.¹⁹²

In endorsing *Cooley's Rule* over *Dillon's*, this Article nonetheless submits that subsidiarity municipalism serves to refine our understanding of it. This is because the traditional formulation of *Cooley's Rule* remains steeped in the sort of sovereignty stuff that, as Vermeule rightly holds, is beside the point.¹⁹³ Rather than some text's formulation of whether a municipal government should be understood to have the inherent power, local power should be understood as omnipotence within a sphere of competence and for the sake of sound order. As stated above with the second principle, matters that have no local dimension – that are about regional or national relations – must be left for resolution by higher orders of government. So too must the regional or national dimensions of local matters. This segues neatly to the final principle.

Fifth: Generality as a Standard for Interpreting Higher Orders' Power.

§ 1.09 (ed. Rev. Ed. 1999) in observing that “Despite some lack of historical accuracy, the theory in the United States has been that the state pre-dates the municipal corporation and that the state, in granting a charter to a municipality, thereby delegates, for the purposes of local state government, a portion of the state’s powers.”)

¹⁸⁹ *Id.* at 169-70 (citing JOHN FORREST DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* 173 (1873 2d. Ed.)).

¹⁹⁰ THOMAS M. COLLEY & ALEXIS C. ANGELL, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES* 358-59 (2d Ed. 1891).

¹⁹¹ *Id.* at 360.

¹⁹² *See supra*, notes 91 through 93 and accompanying text.

¹⁹³ CGC MONOGRAPH, *supra* note 2, at 154.

Finally, against federal and state governments increasingly granular regulation,¹⁹⁴ classical subsidiarity empowers inferior bodies to regulate in service of humanity, albeit indirectly. Consistent with the cooperative federalism it explains,¹⁹⁵ classical subsidiarity implies into U.S. constitutionalism an understanding of higher orders' enactments as broad statements of order and justice adaptable to local circumstances.¹⁹⁶ Such an understanding corresponds to Roman law's distinction between *ius gentium* for imperial matters and *ius civile* for muddling through the everyday discussed above in Section III.A.¹⁹⁷ So when incorporated into U.S. Constitution, the principle does two things. Not only does it reinforce the understanding of the federal government as sovereign over certain areas without possessing general police power,¹⁹⁸ even where its enumerated authority encroaches on local affairs such as, say, grain production or roadside motel operations.¹⁹⁹ It also corrects how we are to understand states' exercise of broad police powers in relation to local communities. In the light of classical subsidiarity, even verbose, detailed state regulatory schemes must be understood as default standards or norms that local orders can adapt to local circumstances. In other terms, it further clarifies field preemption by centering on what aspects are regulated rather than how much a state purports to regulate.²⁰⁰ And consistent with Roman practice, it treats elaborate state schemes as local models guiding local regulation but not precluding local variation.²⁰¹

C. HOW SUBSIDIARITY CAN SERVE DISSENTERS' INTERESTS

Touring legal history brings us to the Article's central point of how subsidiarity helps commoners to coexist under the CGC. Preceding from an understanding of municipal government as an instrument of the common good, this subsection elaborates how subsidiarity municipalism allows localities to be spaces where outsiders can live their lives and enjoy temporal goods within a Traditional polity. Put another way, subsidiarity municipalism represents the proper balance between Tradition's sense that all law exists to provide "the peaceful condition needed to get

¹⁹⁴ See, e.g., Neil Gorsuch and Janie Nitze, *America Has Too Many Laws*, THE ATLANTIC (August 5, 2024), <https://www.theatlantic.com/ideas/archive/2024/08/america-has-too-many-laws-neil-gorsuch/679237/> (lamenting increased volume and length of federal legislation in connection with release of book NEIL GORSUCH & JANIE NITZE, *OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW* (2024)).

¹⁹⁵ See *supra*, note 158.

¹⁹⁶ *Id.*

¹⁹⁷ See *supra*, note 127 through 131 and accompanying text.

¹⁹⁸ See, e.g., *Nat'l Federation of Independent Businesses*, *supra* note 15, at 532-538.

¹⁹⁹ See *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that U.S. constitution's commerce clause authorizes U.S. government to regulate local grain production according to the substantial effects principle); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that U.S. constitution's commerce clause authorizes the U.S. government to enforce anti-discrimination legislation against motel operations because of its location and clientele placed it within interstate commerce stream).

²⁰⁰ For the prevailing understanding of field preemption, see *supra* note 176 and accompanying text.

²⁰¹ LINTOTT, *supra* note 110, at 132-144 (discussing Roman practices in imposing or encouraging local constitutions modelled in Rome).

the benefits of social life and avoid the burdens of contention²⁰² and the practical difficulties resulting from diverse interpretations of what achieves this.²⁰³ In a polity so vast as to be made up of regions that, in one account, amount to nations onto themselves,²⁰⁴ Roman wisdom is vital.

Because the concept described here is better explained concretely, this Article applies the framework elaborated above in Section III.B to live controversies. The aim is to demonstrate that subsidiarity advances a practical and prudential pluralism that even Vermeule concedes.²⁰⁵ To show what difference subsidiarity municipalism can make to how dissenters can live their lives, it engages issues of human sexuality – abortion, same-sex existence, and nonmarital sex – that legal commentary regards *Dobbs* to threaten.²⁰⁶ So that this subsection's approach can be received properly, the subsection first contextualizes the discussion for progressives.

For them, some clarity is needed about the type of municipal progressivism that can solve the problems that the *Dobbs* decision is thought to have created. This subsection argues that subsidiarity municipalism can advance a progressivism closer to the conceptualization that Vermeule deprecates as liturgical:²⁰⁷ law's recognition that, consistent with Roman practice, people should enjoy a measure of freedom with private matters.²⁰⁸ It wholly prescind from a conception of municipal progressivism as a space for sweeping exercises of government power producing broad socioeconomic egalitarianism; that is, the conception of progressivism as the use of authority "to regulate economic problems [and] ameliorate social ills."²⁰⁹ It skips over this for two interrelated reasons informed by Roman practice. It first does so as a matter of precedent. As elaborated above in Section III.A,²¹⁰ the classical legal tradition afforded more local liberty with private law matters than with commercial ones.²¹¹ Roman reflection and practice segue to the second reason,

²⁰² FINNIS AQUINAS, *supra* note 90, at 227. *Accord* CGC MONOGRAPH, *supra* note 2, at 1, 7-8 (stating promotion of common good as legal order's objective and defining common good as peace, justice, and abundance).

²⁰³ Conor Casey, *Common Good Constitutionalism: An Introduction*, ELGAR CONCISE ENCYCLOPEDIA OF LEGAL THEORY AND PHILOSOPHY (forthcoming 2025) [hereinafter "Casey CGC Intro"].

²⁰⁴ COLIN WOODWARD, *AMERICAN NATIONS: A HISTORY OF THE ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA* (2011).

²⁰⁵ Vermeule Liberalism Debate, *supra* note 22 ("Of course this does not mean that there cannot be a second-best, pragmatic and prudential form of pluralism, rooted in the understanding that, as J.F. Stephen emphasized, it is often unwise to attempt to use the rough instruments of the law to lead citizens and society to true beliefs and virtuous habits, at least not too quickly.").

²⁰⁶ See, e.g., Amanda Hainsworth, *Dobbs and the Post-Roe Landscape*, BOSTON BAR JOURNAL (November 7, 2022), <https://bostonbar.org/journal/dobbs-and-the-post-roelandscape/> (arguing that *Dobbs* threatens constitutional privacy rights such as the free use of contraception and same-sex marriage).

²⁰⁷ CGC MONOGRAPH, *supra* note 2, at 118-119 (citing Adrian Vermeule, *Liturgy of Liberalism*, FIRST THINGS (Jan. 2017), <https://www.firstthings.com/article/2017/01/liturgy-of-liberalism>).

²⁰⁸ See generally *supra*, Section III.A.

²⁰⁹ WALTER NUGENT, PROGRESSIVISM: A VERY SHORT INTRODUCTION 3 (2010).

²¹⁰ See *supra*, notes 127 through 131 and accompanying text.

²¹¹ Janne Pölonen, *The Case for a Sociology of Roman Law*, in *LAW & SOCIOLOGY* 409 (Michael D.A. Freeman ed., 2006) (citing SCHULZ, *supra* note 121, at 140-63 (1936)).

one in the spirit of Roman pragmatism. This subsection omits the use of subsidiarity municipalism for broad socioeconomic regulation because it agrees with local government law expert Richard Briffault that such is not achievable. Well before he wrote about “the new preemption” even further constraining local government regulatory authority,²¹² Professor Briffault critiqued his peers’ Charles M. Tiebout and Gerald E. Frug’s progressive vision of municipal power. Tiebout and Frug had argued that municipalities can advance various progressive policy goals such as operating banks as well as insurance companies, providing housing, creating cooperatives, and running profit-making business in such a manner as to empower workers, the poor, and consumers.²¹³ Briffault rejected this based on the practical reality that municipalities are often afflicted with ungovernable multiplicity and residents’ free movement can dissipate the tax base such measures require.²¹⁴ So, while the framework developed above is in principle amenable to some forms of local economic regulation, such is unlikely to work in practice.

With this clarification, this subsection picks back up the thread of concretizing. Let us consider higher orders such as the State of Alabama that have enshrined, as constitutional lodestars, a right to life from conception until natural death,²¹⁵ or others that take up Project 2025’s exhortation to so elevate traditional marriage²¹⁶ and the welfare of the nuclear family.²¹⁷ Let us even suppose that, as Project 2025 further threatens,²¹⁸ the federal government adopts or is sued into adopting²¹⁹ policies elevating these to the same. How might subsidiarity municipalism apply to defend the existence of ordinary people with unwanted pregnancies, in same-

²¹² Richard Briffault, *The New Preemption: Placing Cities in American Federalism*, in CITIES IN FEDERAL CONSTITUTIONAL THEORY 99-100 (Erika Arban ed., 2022) (explaining the new preemption as States preventing localities from regulating subject matters and threatening fines for, civil liability of, and the withholding of State aid from, local officials and governments violating the restrictions).

²¹³ Richard Briffault, *Our Localism, Part II: Localism and Legal Theory*, 90 COLUM. L. REV. 346, 405-08 (1990).

²¹⁴ *Id.*

²¹⁵ As stated in Chief Justice Parker’s concurrence in Alabama Supreme Court’s decision on whether the owners of embryos created through in-vitro fertilization have a rightful death claim, *LePage v. The Center for Reproductive Medicine, P.C.*, 2024 WL 656591 at *9 (2024):

[The Alabama] state Constitution contains the following declaration of public policy: “This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.” Art. I, § 36.06(a), Ala. Const. 2022 (adopted Nov. 6, 2018) (sometimes referred to as “the Sanctity of Unborn Life Amendment”).

²¹⁶ See Kevin D. Roberts, *Foreword: A Promise to America*, in THE HERITAGE, FOUNDATION MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 6 (Paul Dans & Steven Groves eds., 2023).

²¹⁷ *Id.* at 4.

²¹⁸ *Id.* at 6.

²¹⁹ See Gerald V. Bradley, *Life After Dobbs*, FIRST THINGS (August 2023), <https://www.firstthings.com/article/2023/08/life-after-dobbs> (contending that Dobbs is a pro-life holding based on five aspects and contending that, based on its apparent recognition of potential life is a fact distinguishing it from other privacy decisions, it has opened the way for pro-life litigation).

sex marriages, or engaging in a variety of nonmarital sex within such polities? This subsection elaborates a path based on the framework stated above in Section III.B.

Step One: Forming Dissenting Communities. As a preliminary matter, the framework affords communities of likeminded dissenters the right to form their own municipalities within such a polity. Think of counties within states or cities, towns, or villages within counties formed to enfranchise communities of dissidents by granting them control and administration of their quotidian affairs. Under the framework, dissenters can do so even within polities appearing to require state commissions or bodies to approve or reject proposed municipalities.²²⁰ One can anticipate the main controversy being some higher order – likely the state itself or some governor – seeking to hamstring or prevent the formation of such a municipality, presumably by repealing any positive law formation procedure that current law presupposes²²¹ or pursuing one of the new preemption measures referenced above.²²² Happily, even in such a situation, the classical legal tradition also supplies the solution: the default principle of *lex majoris partis* for any deliberate collection of people.²²³ According to this, a simple majority within a defined territorial space can declare a new municipality, aiding likeminded dissidents to group and organize themselves under their own rule. The classical default is even more beneficial than *Cooley's Rule* discussed above in Section III.B. For in recognizing the inherent right to local government, *Cooley's Rule* nonetheless concedes that the higher order of a State has the power to prescribe the form of government.²²⁴ Since this also means that states can specify the procedures by which communities can form a municipality, *Cooley's Rule* affords fodder for obstruction that is absent from the default principle. Of course, where the polity contains a procedure for formation, dissidents can simply use it and organize themselves around supermajority requirements or other procedural hurdles.

Steps Two and Three: Using Municipal Government to Pass Local Laws Protecting Dissenters' Liberties. Here, the requirements of factual specificity and the presumption in favor of regulating local affairs are merged because, on the ground, they are seamless, as my above framing suggests. Continuing with our case of progressive municipality within a prolife polity, subsidiarity affords options that need not look like open defiance, or some formal doctrine of nullification. Rather, subsidiarity municipalism affords local space for liberty rooted in genuine common-good concerns. So, for instance, a municipality can, consistent with a Right to Life constitution, adopt a policy declining to prosecute domestic matters. Such a policy based on findings of fact about causes of resident hospitalizations or the limited

²²⁰ REYNOLDS, *supra* note 170, at 248-249.

²²¹ *Id.* at 242.

²²² *See supra*, note 212.

²²³ Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 COLORADO L. REV. 763 (1994) (citing papers of James Madison in arguing that “the vital principle of republican government is the *lex majoris partis*, the will of the majority”); Akhil Reed Amar, *Lex Majoris Partis: How the Senate Can End the Filibuster on Any Day by Simple Majority Rule*, 63 DUKE L. J. 1483, 1485 (2014) (citing Locke’s Second Treatise on Government that majority rule is the natural default principle of all assemblies).

²²⁴ *See supra*, note 190 and accompanying text.

resources meets a natural law criterion.²²⁵ Such an enactment passes the mark for two reasons.

First, as covered above in Section III.B with reference to Cédric Brélaz's scholarship,²²⁶ Roman law's classical subsidiarity recognized a right to local criminal administration. The Roman structure afforded localities the power to create offices such as *paraphylakes*, to give them a distinct role in law enforcement toward protecting local interests, and to regulate the manner and scope of their exercising power.²²⁷ So, a local government determining to limit the circumstances where local law enforcement power can be exercised would be well within what the classical legal tradition has recognized.

Second, whatever Tradition's views on whether a polity committed to the defense of life from conception until natural death must criminalize abortion, the law understands the protection of unborn life to be complicated by its dependence upon another and her cooperation.²²⁸ This insuperable complexity has led to the issue to be regulated outside the criminal justice system. This is the narrow sense, recognized both in Part VI of Justice Blackmun's *Roe v. Wade* majority opinion²²⁹ and in Wolfgang P. Müller's study,²³⁰ that even during Christendom, the *de facto* decriminalization of abortion was thought perfectly consistent with the sanctity of human life. For example, Müller's study notes that amid the expansion of scholastic theology's denunciation of abortion and classification of it as a felony, juries determining the secular prosecution of abortion in modern Czechia and England widely refused to convict.²³¹ Emphasizing this refusal's roots in subsidiarity, Müller's study observes that such lay jurors came to reject scholasticism's equation of abortion with criminal prosecution based on local concerns. The following passage from his study conveys this spirit:

In view of learned recognition and prosecutorial indications suggesting that induced miscarriages stopped being a felony in English common law from early in the reign of Edward III, what factors were responsible for the swift abandonment of judicial rigors after the thirteenth century? At some distance and in a different legal context, lay jurors meeting at Brno [Czechia] around 1353 produced important evidence to the effect that the scholastic equation of abortion with homicidium did not enjoy the unanimous support of ordinary Christians and was resented especially by groups concerned with their honorable status and standing

²²⁵ Cf. CGC MONOGRAPH, *supra* note 2, at 148, n. 390 (discussing resource allocation as a fundamental principle of *ius* independent of positive law that administrative agencies draw upon).

²²⁶ See *supra*, notes 130 and 131 and accompanying text.

²²⁷ *Id.*

²²⁸ See, e.g., Judith Jarvis Thomson, *A Defense of Abortion*, in THE PHILOSOPHY OF LAW 112 – 128 (Ronald W. Dworkin ed., 1977) (arguing that even if a fetus is recognized as human from moment of conception, parasitical nature of its development justifies abortion as an act of self-defense).

²²⁹ *Roe v. Wade*, 410 U.S. 113, 129-147 (1973), *overruled by Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

²³⁰ WOLFGANG P. MÜLLER, THE CRIMINALIZATION OF ABORTION IN THE WEST: ITS ORIGINS IN MEDIEVAL LAW (2012).

²³¹ *Id.* at 140-142, 154-155.

in the community. One faction of the Moravian Schöffen [judicial panel] pointed out that, by custom, the killing of unborn and newborn humans was to be left to the discretion of the delivering mothers. That panel members appointed to return criminal verdicts in England were similarly inclined to regard the death and survival of nascent children as properly pertaining to the domain of parenthood, in spite of the supervisory claims advanced by secular authorities, can also be inferred from a wider selection of court data.²³²

In a similar vein, a municipality can respect a higher sphere's principle of Traditional marriage while also dealing with the perennial dilemma of sex work. To take an example of what such a policy can look like, consider local regulation modeled on New York County District Attorney Alvin Bragg's January 3, 2022 Policy and Procedure Memorandum. That policy disclaims or narrows the prosecution of prostitution, among other crimes, in the interest of safety and fairness.²³³ As explained in that memorandum, the District Attorney adopted such a policy toward focusing resources to incarcerate only for offenses causing the most significant harm, on the logic that such would make the population safer in view of sociological data.²³⁴ Such regulatory practice follows even Christendom's practice with sex work, which was recognized and regulated as a necessary evil.²³⁵ Reflecting subsidiarity, municipal authorities throughout medieval Europe placed it under strict control without abolishing it; and it was they, not central authorities, who were charged with regulating it.²³⁶ Such control amounted to establishing licensed and occasionally municipally owned brothels and red-light districts.²³⁷ In England, even an ecclesiastical figure, the Bishop of Winchester, regulated brothels in his capacity as a property owner, subjecting disputes arising out of their operation to the jurisdiction of his court.²³⁸ The sanction and regulation of sex work was rooted in a pragmatism that we should now recognize as misogynistic. It was a response to activity meeting male demand that helped preserve social order by "preventing homosexuality, rape, and seduction" consistent with the prevention of spreading disease.²³⁹ This misogynistic pragmatism accounts for one of its salient features common to all regulatory regimes across continental Europe: its restriction to specified areas within a municipality.²⁴⁰ Christendom's practice of regulated acceptance seamlessly carried over into the United States, where it was a common practice from the latter half of the nineteenth century into the early twentieth.²⁴¹

²³² *Id.* at 154. Müller proceeds to cite Barbara Hanawalt's study of judicial records from 1300 to 1348 showing virtually no convictions for infanticide and prenatal homicide.

²³³ Alvin J. Bragg, Jr., *Day One Letter and Policy and Procedure Memorandum*, DISTRICT ATTORNEY: COUNTY OF NEW YORK (January 3, 2022), <https://manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf>.

²³⁴ *Id.* at 1.

²³⁵ Ruth Mazo Karras, *The Regulation of Brothels in Later Medieval England*, 14 J. OF WOMEN IN CULTURE AND SOCIETY 399 (1989).

²³⁶ *Id.* at 401, 406.

²³⁷ *Id.* at 401.

²³⁸ *Id.* at 423-424.

²³⁹ *Id.* at 402, 405-406, and 420.

²⁴⁰ *Id.* at 403.

²⁴¹ As established by the opening paragraph of Neil Larry Shumsky, *Tacit Acceptance:*

So, municipal pragmatism about human sexuality amid general norms promoting chastity²⁴² is part of a venerable tradition.

To take yet a third example emerging in the wake of *Dobbs*, subsidiarity would also allow municipalities to protect the practical gains of same-sex marriage at a local level, where people live. If *Obergefell* were to be overturned,²⁴³ and if higher orders were to adopt constitutional provisions enshrining Traditional marriage, subsidiarity would still allow municipalities to recognize and register same-sex marriages. Such ordinances might be a regulatory scheme extending to same-sex couples all rights such as visitation and inheritance associated with their status and offering them a local credit or subsidy offsetting the absence of federal and state tax benefits. Allowing this would be wholly consistent with what José Luis Alonso's scholarship observes of Roman Egypt²⁴⁴ and justified by Ulpian's principle²⁴⁵ in putting similarly situated same-sex residents in the same position as their similarly situated neighbors, so advancing tranquility. And within the U.S. constitutional order, it seems unavoidable that such local same-sex marriages must be entitled to export such social rights throughout the country incidental to the couples' fundamental right of travel.²⁴⁶

Steps Four and Five: Judicial Affirmation of Municipal Pragmatism: The last point of concretization is to imagine how courts should determine the inevitable lawsuits that some higher order will bring challenging the municipality's local regulation as undermining the polity's norms. Or, as illustrated by the recent

Respectable Americans and Segregated Prostitution, 1870-1910, 19 J. OF SOCIAL HISTORY 665 (1986):

During the latter half of the nineteenth century and early years of the twentieth, American cities experimented with the informal legalization of prostitution. While laws against prostitution, solicitation, and pandering remained on the books, they were selectively enforced. Women who confined their activities to certain "segregated" or "tolerated" districts were generally left alone, and allowed to practice their profession. By 1900, nearly every large American city, and many smaller ones, too, possessed and recognized a well-known red-light district where prostitution flourished.

²⁴² E.g., Karras, *supra* note 235, at 404 ("Despite the recognition that prostitution was a necessary feature of society, the municipalities of continental Europe still paid lip service to the Church's ideals of sexual purity. Regulations from municipal brothels in Languedoc and in Germany provide that the houses should not be open for business on holy days or that the women should all leave the brothel during Holy Week. During Lent and especially during Holy Week the prostitutes were to listen to sermons intended to sway them from their life of sin.") The article adds that, with those governing Southwark, London, regulations did not even pay this lip service, so revealing little interest in sexual morality. *Id.* at 422.

²⁴³ See *supra*, note 206.

²⁴⁴ See *supra*, notes 128 and 129 and accompanying text.

²⁴⁵ See *infra*, note 323.

²⁴⁶ Mark Strasser's argument in *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553, 582 – 588 (2000) goes further and argues that *Loving's* understanding of marriage as a fundamental right means that other jurisdictions must recognize same-sex marriages of residents who move to a jurisdiction, not merely visit. Because visiting is a less invasive form of travel, this argument at least supports recognizing social rights for those passing through.

imbroglio involving a Florida State Attorney,²⁴⁷ we can anticipate higher authorities threatening to suspend or remove local officers exercising administrative discretion in favor of liberty. As with steps two and three, these steps are merged because the application of *Cooley's Rule* and the principle of higher generality flow together. Let us suppose that the municipality or municipal official enacting the nondisturbance policy suggested above has stated it provocatively or unartfully, pontificating liturgically or purporting to arrogate general authority that they lack. A court should still uphold such a local regulation or prevent the suspension or removal of the issuing municipal officer so long as the regulation can be cabined to local affairs and subjects. The point can be stated more strongly: a court should cabin a local law toward upholding it or preserving the local officers' prerogatives. Even if a local municipality's nondisturbance policy goes one step further than *nolle prosequi* and purports to create obligations—consider a local law with the same requirements as those in the Emergency Medical Treatment and Labor Act (EMTALA)²⁴⁸ at issue in the recent Idaho abortion litigation²⁴⁹—that dispute should still be resolved in favor of such local regulation. The key would be to construe the measure as a regulation governing hospitals administering emergency care to local residents, and not a general regulation of hospitals that just so happen to be located within municipal limits. *Ius* lies in the difference between the two. When refined as a pronouncement upon local matters, such an ordinance can properly and sensibly be understood as a local regulation on emergency care, not some local opinion on a broader societal question committed to a higher order. In this sense, a “Right to Life” constitutional precept can be disregarded as irrelevant to such regulation where it focuses on issues prescinding from the lofty question. It is precisely because a higher orders' enactments are understood as general and instructive in contrast to lower orders' specific and functional solutions to identified problems that apparent conflicts can be avoided.

In a similar vein, both that local policy of Red-Light Districts and that sort of local ordinance providing for local same-sex couples' companionship rights described above in steps two and three are also compatible with a regime of Traditional marriage. With these, the key is again understanding them as provisions for local residents solving identified social problems and not as a general statement of liberation from Tradition norms.

D. HOW SUBSIDIARITY MUNICIPALISM IS CONSISTENT WITH NATURAL LAW'S VIRTUE REGULATION

So far, this Article's argument has largely been addressed to the Left in arguing that subsidiarity municipalism can protect dissenters' right of coexistence. But one last aspect of subsidiarity municipalism must be taken up and is directed to Traditionalists: the matter of whether it represents a legitimate interpretation of the classical legal tradition. Because the classical legal tradition holds that law exists

²⁴⁷ As recounted in *Warren v. DeSantis*, 90 F.4th 1115, 1119-1124 (11th Cir. 2024) (reinstating lawsuit, on U.S. Constitution First Amendment grounds, by state attorney suspended by governor for statements on intended exercise of prosecutorial discretion and advocacy for exercise of abortion rights).

²⁴⁸ 42 U.S.C. §1395bb[b].

²⁴⁹ *Moyle v. United States*, 144 S. Ct 2015 (2024).

to encourage human flourishing ordered to humans' supernatural end, including by inculcating virtue and right beliefs,²⁵⁰ this subsection must address whether subsidiarity municipalism undermines that commitment. In essence, the question is whether municipalities, in this Article's framings, are the very zones of disorder Vermeule's notion of positive subsidiarity is meant to combat.²⁵¹ If they are merely that, then subsidiarity municipalism is some counterfeit version of a natural law legalism.

To address this question, this subsection develops two points. Before doing so, however, it frames how we should think about what Tradition ordains. A book Vermeule's CGC heavily relies on²⁵² acknowledges that natural law reasoning is perfectly consistent with outcomes that can be considered progressive in the sense mentioned above in Section III.B. Indeed, the natural law was cited as a source for the right to privacy that Traditionalist legal scholars have long decried.²⁵³ Even more to the point, Vermeule's invocation of Ronald Dworkin's arguments²⁵⁴ shows that natural law principles are susceptible to a diversity of conclusions, a point that Conor Casey explicitly makes.²⁵⁵ So, the two points developed here account for how Tradition is open to what we may classify as progressive outcomes, a natural consequence of Vermeule's point that legal problems require determination because principles must be concretized.²⁵⁶

Turning now to the points, Aquinas' political thought, so instrumental to CGC, supplies the foundation for progressive outcomes. As this Article itself illustrates, Aquinas has been cited both for liberal democracy and for sharp authoritarianism because he maintained two ideas in tension.²⁵⁷ The first is the Aristotelian notion that human beings, as social animals, are better together in community and society, where they can acquire virtue through socialization.²⁵⁸ The second is the notion, based on Augustine of Hippo's political thought, that the human person must not

²⁵⁰ CGC MONOGRAPH, *supra* note 2, at 28-29 (citing also WALTER FARRELL, *THE NATURAL LAW ACCORDING TO AQUINAS AND SUÁREZ* (Cajetan Cuddy ed., 2019); Casey CGC Intro, *supra* note 203, at *1, *5 (stating that CGC is grounded in classical legal tradition and stating that it holds law can be used to inculcate desires, habits, and beliefs conducive to flourishing).

²⁵¹ CGC MONOGRAPH, *supra* note 2, at 155-156 (citing JOHANNES MESSNER, *SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD* (1965) in describing subsidiarity as principle authorizing a higher order to intervene during a state of exception). *Cf.* SCHULZ, *supra* note 121, at 140 (nothing limitations inherent in the Roman conception of liberty).

²⁵² *See* CGC MONOGRAPH, *supra* note 2, at 5, n. 10.

²⁵³ STUART BANNER, *THE DECLINE OF NATURAL LAW* 23 (2021) ("As late as 1905, when the Georgia Supreme Court become one of the first courts to recognize a right of privacy, the court declared that 'the right of privacy has its foundation in the instincts of nature. It is recognized intuitively.' Natural law was the subject of a learned tradition, but it was also commonly said to be a subject for which no learning was necessary"). On the longstanding conservative criticism of a right to privacy, *see* Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L.J. 715, 719-720 (2010).

²⁵⁴ CGC MONOGRAPH, *supra* note 2, at 5-6.

²⁵⁵ Casey CGC Intro, *supra* note 203, at *3 (explaining how CGC is eminently pluralist.)

²⁵⁶ CGC MONOGRAPH, *supra* note 2, at 44-47

²⁵⁷ THOMAS GILBY, *BETWEEN COMMUNITY AND SOCIETY: A PHILOSOPHY AND THEOLOGY OF THE STATE* 203-204 (1953).

²⁵⁸ *Id.*

be swallowed up in the group and retains an independence from society.²⁵⁹ From this flows the two ways in which the subsidiarity municipalism sketched here is consistent with the classical legal tradition developed by Aquinas.

First, simply as regulated structures, municipalities advance the common good through the idea of sound public order. In their actual function, they bring dissenters under Tradition solely through ordering them into community and requiring that they operate according to sound reason. This inculcates virtues of stability and community. This basic virtue-as-socialization is what Aquinas' political thought seemed to have aimed for, eschewing the notion that law should regulate all aspects of morality.²⁶⁰

Second, subsidiarity municipalism provides concrete answers to the question of what is to be done with many people outside norms such as people who do not assume the health risks and toll of pregnancy despite optimism about adoption.²⁶¹ Or gay people who are and have been in committed long term relationships such as Edith Windsor and Thea Speyr.²⁶² Or people who, for a variety of reasons, buy and sell sex.²⁶³ To put this question from the perspective of Tradition seeking to inculcate respect for life and public order, there remains the issue of how exactly unborn lives are to be saved when they require the cooperation of women's wombs. Or what to do with committed and stable couples who happen not to be heterosexual. Or what to do about human passions such as sexual desire, desperation, and economic necessity whose confluence can produce public health and safety problems. Tradition allows for progressive solutions because, as discussed above in Section III.A, governments closest to human communities have the role that Vermeule assigns to administrative agencies in CGC: that of determining how immutable principles of justice apply to specific situations.²⁶⁴ The only difference between the argument here and Vermeule's is this: whereas common good administrative agencies determine how general laws apply to specific factual circumstances under the Administrative Procedure Act (APA)'s various categories,²⁶⁵ municipalities and municipal officials issue ordinances and adopt policies adapting the entire natural law framework to particular, discrete communities. In other terms, municipalities

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 236-238.

²⁶¹ *Dobbs*, *supra* note 30, 597 U.S. at 258-259 (discussing states' "Safe Haven" laws).

²⁶² *U.S. v. Windsor*, 570 U.S. 744, 763 (2013).

²⁶³ WE TOO: ESSAYS ON SEX WORK AND SURVIVAL 11-12 (Natalie West ed., 2021) (from a decriminalization perspective on sex work, framing sex worker as one compelled by same economic necessity as any other and who seeks to improve the material conditions of their work).

²⁶⁴ See CGC MONOGRAPH, *supra* note 2, at 151-162. Vermeule's recent article returns to the theme that executives enjoy broad authority constrained only by natural law. See Adrian Vermeule *The Constitution of Hierarchy*, FUDAN J. OF HUMANITIES AND SOCIAL SCIENCES 6-7 (2024), <https://doi.org/10.1007/s40647-024-00401-8> [hereinafter "Vermeule Const. of Hierarchy"] (explaining that under classical tradition, the sovereign's exercise of power is not jurisdictionally limited but rather substantively so, by natural and divine law, and citing Jean Bodin Baldus in referring to the emperor as a "they," a "complex of officials, advisors, and bureaucrats.").

²⁶⁵ I mean the internal coherence of adjudication, rulemaking, orders, etc. that Vermeule grasps. See CGC MONOGRAPH, *supra* note 2, at 152-153.

administer broad justice at a more intimate level, regulating the mundane.²⁶⁶ As such, subsidiarity municipalism can produce a dynamic and developing constitutional structure and order without ceasing to be law as a rational ordering.²⁶⁷

So, progressive *modi vivendi* are admissible outcomes within a classical polity because dissenters are Aristotelian natural human communities. If the takeaway from George Chancey's history is that gay culture emerges from urbanity,²⁶⁸ for instance, then we can fairly conclude that there have been gay communities so long as there have been cities. This is a conclusion only reinforced by gay and Roman Catholic social historian John Boswell's hypothesis of same-sex unions in antiquity and Christendom.²⁶⁹ Even that scholarship rejecting the notion that these were same sex marriages in the modern sense nonetheless recognizes that they were at least some form of natural human community.²⁷⁰ It is such a same-sex human community that John Henry Newman appears to have been sustained by,²⁷¹ showing how organic human communities are among the common goods²⁷² that subsidiarity municipalism as a natural law concept should further.

Free human movement also raises practical questions that can rationally be worked out progressively, such as with schemes guaranteeing confidentiality and immunity to conduce cooperation and local tranquility. One of higher authorities' most prominent challenges is their inability to effectively enforce criminal laws against aspects of human existence absent local authorities' assistance.²⁷³ Without

²⁶⁶ Hence Vermeule's point that, even under subsidiarity, higher orders should intervene to regulate during states of exception. *See supra*, note 78 and accompanying text. He does not elaborate this concept, merely citing Carl Schmitt's work. But the reference to Schmitt is enough for us to recognize that states of exception are extraordinary, and therefore are matters beyond local bodies' competence to regulate.

²⁶⁷ *Cf.* Vermeule Const. of Hierarchy, *supra* note 264, at 8-9.

²⁶⁸ GEORGE CHANCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940* 2-3, 355 (1994) (framing account as challenging the myths of isolation and invisibility, which obscures extensive gay society before the postwar gay liberation movement).

²⁶⁹ A theory elaborated over two texts: JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1981) and JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994).

²⁷⁰ *See, e.g.*, Claudia Rapp, *Ritual Brotherhood in Byzantium*, 52 *TRADITIO* 285 (1997) (disputing Boswell's thesis that spiritual marriages between men and women were romantic but nonetheless concluding that they were, along with marriage, social networking strategies, sometimes used in combination, to create friendly ties and obligations for the exchange of gifts and favors, promotions, or military assistance).

²⁷¹ Barbara Bradley Hagerty, *Was Cardinal John Henry Newman Gay?*, NPR (Sept. 17, 2010), <https://www.npr.org/2010/09/17/129930850/was-cardinal-john-henry-newman-gay> (referencing John Henry Newman's 32 year relationship with fellow Roman Catholic Priest Ambrose St. John, who helped Newman with his scholarship, translations, and general care.)

²⁷² For this as a good, *see* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 88 (2d ed., 2011) (contending that basic human goods include "the value of that sociability which in its weakest form is realized by a minimum of peace and harmony amongst persons, and which ranges through the forms of human community to its strongest form in the flowering of full friendship").

²⁷³ This is the practical limitation to the concern about Donald Trump weaponizing the federal government stated in a recent article. *See* Ronald Brownstein, *Trump's 'Knock*

local buy-in and information from people on the ground, the higher orders cannot enforce norms.²⁷⁴ Human movement always presents operational challenges that prevent higher orders from fulfilling their remit without local assistance, if for no other reason that they lack information required for enforcement. To be clear, this subsection acknowledges that higher governmental authorities have devised scaled systems of surveillance, arrest, and pressure. For example, the racistly named “Operation Wetback,” or post-war grand scale deportation of actually and apparently undocumented Mexicans, was such a moment.²⁷⁵ So too is the present moment during these early days of the Trump Administration. But the story of that infamous operation also illustrates the reality. It worked only because it had ground support,²⁷⁶ the type providing reliable inside information sufficient to establish probable cause.²⁷⁷

With all that said, the argument here readily acknowledges that the practical liberty available under subsidiarity municipalism costs what *Obergefell* provides: dignity understood to mean the social reality of others’ acceptance and affirmation, or actual lived equality.²⁷⁸ The subsection acknowledges that the reproductive freedom available under subsidiarity municipalism is steeped in the indignity of stigma as it seems to revive the notion that abortions should be safe, legal, and rare,²⁷⁹ and not a part of equal citizenship.²⁸⁰ Or it undermines the dignity of sex work as work by confining it to municipal margins. In response, this subsection points out that one principled way to read Vermeule’s objection to the liturgical aspect of progressive constitutionalism²⁸¹ is as a rejection of dignity as law’s business. So understood, subsidiarity municipalism would change nothing because, in this sense, dignity has always been beyond the law’s scope. Law lacks jurisdiction over hearts and

on the Door’ The former president and his aides are formulating plans to deport millions of migrants, THE ATLANTIC (Feb. 8, 2024), <https://www.theatlantic.com/politics/archive/2024/02/trumps-immigration-plan-is-even-more-aggressive-now/677385/>.

²⁷⁴ See, e.g., ADAM GOODMAN, THE DEPORTATION MACHINE: AMERICA’S LONG HISTORY OF EXPELLING IMMIGRANTS 52-70 (2020).

²⁷⁵ *Id.* at 53-54 (describing expulsion effort as relying on immigrants’ self-removal by fear and noting that it involved coordination with local officials and relied on tips and informants to carry out piecemeal deportation campaigns).

²⁷⁶ *Id.*

²⁷⁷ On the probable cause standard, see, e.g., *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964) (stating it as “whether at that moment the facts and circumstances within [a police officer’s] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.”).

²⁷⁸ *Obergefell*, *supra* note 39, 576 U.S. at 668-672 (noting that exclusion of same-sex couples from marriage stigmatizes children of such unions by making their families somehow lesser and stigmatizes and injures same-sex couples themselves).

²⁷⁹ See Anna North, *How the Abortion Debate Moved Away From “Safe, Legal, And Rare,”* VOX (Oct. 18, 2019), <https://www.vox.com/2019/10/18/20917406/abortion-safe-legal-and-rare-tulsi-gabbard>.

²⁸⁰ See, e.g., Reva B. Siegel, *Equality and Choice: Sex Equality Perspective on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. OF GENDER AND LAW 63, 70-71 (2013) (citing Ginsburg’s 1985 UNC Law Review article stating preference that right to abortion be grounded in equal protection so that women’s claims to reproductive choice are uncoerced and unsteered by the government.).

²⁸¹ See *supra*, note 207.

minds, the reason that school segregation persists throughout the United States despite the enactment of sweeping civil rights frameworks long ago.²⁸² Law is most useful in creating structural conditions favorable to those human interactions that produce conversion.²⁸³ This corrective helps to focus energy and effort where such will be fruitful in protecting commoners' gains rather than futilely leaving vulnerable groups exposed by the pursuit of liturgical conversion rather than concrete outcomes.

What then of a related Traditionalist concern, Conor Casey's description of CGC as recognizing law's role in inculcating virtue and beliefs?²⁸⁴ Subsidiarity municipalism also allows for the law to advance moral virtue but only through its didactic and exemplary dimensions. Building on the salutary sense in which the U.S. local communities are described as laboratories of democracy,²⁸⁵ subsidiarity municipalism allows the law to inculcate moral virtue structurally, through the formation of counterweighing municipalities engaging in Traditionalist regulation. Put somewhat differently, this subsection's argument understands Conor Casey's point to be satisfied by authorizing spaces for organic, human persuasion. To dispel any doubt, just as subsidiarity municipalism allows the formation of communities enabling dissenters to coexist and protect their temporal goods, it also allows space for Traditionalist communities to demonstrate virtuous living and so attract by example. The argument in Section III.C also allows for municipalities like Ave Maria, Florida²⁸⁶ to adopt all forms of social regulation within municipal limits free of the individual rights claims Vermeule rejects as a distortion of natural rights.²⁸⁷ Under the subsidiarity municipalism framework, nothing in the federal constitution's speech clauses would prevent a local community, based on the same

²⁸² See El Kilgore, *Marking 70 Years of White Flight From School Integration*, NEW YORK MAGAZINE: INTELLIGENCER (May 18, 2024), <https://nymag.com/intelligencer/article/marking-70-years-of-white-flight-from-school-integration.html#:~:text=Friday%20was%20the%2070th%20anniversary%20of%20the%20U.S.,the%20Equal%20Protection%20Clause%20of%20the%2014th%20Amendment> (observing widespread school segregation 70 years after the U.S. Supreme Court's decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and attributing it to White opposition to strategies for realizing integration).

²⁸³ See *supra*, note 202. Cf. Sequoia Carrillo and Pooja Salhotra, *The U.S. Student Population Is More Diverse, But Schools Are Still Highly Segregated*, NPR (July 14, 2022), <https://www.npr.org/2022/07/14/1111060299/school-segregation-report> (attributing school segregation to structural factors such as housing discrimination and school district secessions).

²⁸⁴ See *supra*, note 250.

²⁸⁵ See, e.g., *Garber v. Menendez*, 888 F.3d 839, 844 (6th Cir. 2018) (citing McConnell, *supra* note 160, at 1503-1504 in observing that “[s]tates discourage residents from leaving whenever they provide residents with policies they like. That indeed is the point of the benefits. But the States’ ability to attract and retain residents through policy choices has long been considered a healthy byproduct of the laboratories of democracy in our federalism-based system of government, not a sign of unconstitutional protectionism.”).

²⁸⁶ Pamela López Campos, *Ave Maria, The “Custom-Built” City for Catholics in Florida*, OMNES MAGAZINE (April 29, 2024), <https://omnesmag.com/en/news/ave-maria-ciudad-catolicos-florida/> (describing unincorporated community inspired by Catholicism promoted by Tom Monaghan, the founder of Domino's Pizza).

²⁸⁷ CGC MONOGRAPH, *supra* note 2, at 170-171 (criticizing an understanding of free speech that prohibited federal government from regulating virtual child pornography).

sound findings of fact and local circumstances, from regulating the consumption of pornography within municipal limits.²⁸⁸ Because others can form their own community, can protect the right to consuming pornography based on specific factual circumstances, and can vote with their feet, a municipality engaging in Traditional regulation is within its power.

In arguing this, this subsection acknowledges that, for many Traditionalists, communities of virtue depend on widespread affirmation because many aspects of public morality are difficult. For example, many Traditionalists recognize that marriage and parenthood are moral commitments upon which a social order depends that require social buy-in.²⁸⁹ Under this account, such can be undermined by free movement. But no real alternative is achievable in a pluralist society. Just as, discussed above, progressives must bear indignity to coexist with others, Traditionalists must pay the price of restraint. That people must be left to some measure of independence from coercion represents Western law's reflection on Tradition in light of historical experience, a conclusion that the Roman Catholic Church has reached.²⁹⁰ It is an experience instructing that people must not be compelled to virtue through state apparatus and cautioning to rely on practical and prudential pluralism in teaching natural law so as to maintain peace and order.

IV. A JURISPRUDENCE OF COMMON GOOD PLURALISM: SUBSIDIARITY MUNICIPALISM AS THE ROBERTS COURT'S SOLUTION TO DIFFERENCE

Next, this Article defends its thesis by rooting it in the Roberts Court's jurisprudence about the conflict between general law and associative freedom. To make this point, it examines two cases raising this issue: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*²⁹¹ and *Fulton v. City of Philadelphia*.²⁹² This section contends that applying the lens of pluralist coexistence resolves the doctrinal difficulties that legal commentary has identified in these cases. To support this contention, the

²⁸⁸ In other terms, subsidiarity municipalism would allow something like the Catherine MacKinnon-Andrea Dworkin model anti-pornography ordinance if based on local findings of fact. For the text and context of that model ordinance, see Claudia Spaulding, *Anti-Pornography Laws as a Claim for Equal Respect: Feminism, Liberalism & Community*, 4 BERKELEY WOMEN'S L. J. 128, 130-31 (1988).

²⁸⁹ See, e.g., Lynn D. Wardle, *A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and "the Tragedy of the Commons,"* 22 B.Y. U. J. OF PUB. L 441, 462 and 464 (2008) (arguing against same-sex marriage from a conservative standpoint on the basis that same-sex marriage threatens to unloosen the connections, expectations, and responsibilities of traditional marriage, parenting, and families to the institution's detriment).

²⁹⁰ See, e.g., Drew Christiansen, *Commentary on Pacem in Terris (Peace on Earth)*, in MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES & INTERPRETATIONS 226-228 (Kenneth B. Himes et al. eds., 2004) (arguing that World War II and Cold War developments led Roman Catholic Church's Magisterium to pronounce teaching on individual rights, democracy, and constitutional government subject to the common good based on persuasion rather than fear).

²⁹¹ 584 U.S. 617 (2018).

²⁹² 593 U.S. 522 (2021).

argument here marshals forensic evidence from the opinions themselves, much like Section III.A above did to show that Aquinas' political thought is rooted in Roman practice.

Lest this exercise be misunderstood, an acknowledgement must be foregrounded. This Article has no misgivings about whether the cases discussed below may be counterrevolutionary. The justices voting in the majority might well have been, and likely were, sympathetic to a peculiar viewpoint, evidenced by some of *Obergefell's* dissenting opinions.²⁹³ Further evidence of bias on the part of at least some Roberts Court members is this past summer's secretly recorded remarks of Chief Justice John Roberts and Justice Samuel Alito, where the latter gives up the Christian nationalist ghost.²⁹⁴ So, the point here is not their intention, but rather a public meaning that can be given to the majority opinions.²⁹⁵ The Article contends that their public meaning affirms pluralist coexistence in evincing solicitude for radically different peoples to coexist within a single polity.

Proceeding chronically, we begin with *Masterpiece Cakeshop*, the case about Colorado baker Jack Phillipps' refusal to bake a case for a same-sex couple's wedding because of his religious opposition to same-sex marriage.²⁹⁶ In criticizing Justice Anthony Kennedy's majority opinion holding that the Colorado Human Rights Commission violated the baker's free exercise rights, legal commentary has accused Justice Kennedy of inconsistency and betrayal of his commitment to same-sex dignity expressed in the court's entire gay rights jurisprudence, all of which majority opinions he authored.²⁹⁷ His opinion in *Masterpiece Bakery*, however, suggests that Justice Kennedy's commitment to same-sex couples' place in society is better understood as a part of a larger pluralist commitment.²⁹⁸ For the opinion twice accentuates the Colorado Commission on Human Rights' denigration of the baker's religious views. The point is best made by Justice Kennedy himself, in this extensive excerpt from Part II.B of his majority opinion:

As noted above, on at least three other occasions the [Colorado] Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with

²⁹³ For example, Justice Alito's dissent lamenting that same-sex marriage portends decay of marriage and social estrangement from the connection between marriage and procreation. See *Obergefell*, *supra* note 39, 516 U.S. at 739-740.

²⁹⁴ Abbie VanSickle, *In Secret Recordings, Alito Endorses Nation of "Godliness."* *Roberts Talks of Pluralism*, N.Y. TIMES (June 10, 2024) <https://www.nytimes.com/2024/06/10/us/politics/supreme-court-alito.html>.

²⁹⁵ Cf. RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER & SPIRIT 2-3 (2021) (describing U.S. legal culture's shift from original intention to original public meaning provoked by Paul Brest's 1980 article on originalism).

²⁹⁶ 584 U.S. at 626-627.

²⁹⁷ See, e.g., Erwin Chemerinsky, *Not a Masterpiece: The Supreme Court's Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 43 HUM. RTS. 11, 15 (2018).

²⁹⁸ As also observed in William N. Eskridge, Jr. & Robin Fretwell, *Anthony Kennedy Opens New Chapter in American Pluralism*, REAL CLEAR RELIGION (July 18, 2018), https://www.realclearreligion.org/articles/2018/07/18/anthony_kennedy_opens_new_chapter_in_american_pluralism.html.

religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included “wording and images [the baker] deemed derogatory,” *Jack v. Gateaux, Ltd.*, Charge No. P20140071X, at 4; featured “language and images [the baker] deemed hateful,” *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X, at 4; or displayed a message the baker “deemed as discriminatory, *Jack v. Azucar Bakery*, Charge No. P20140069X, at 4.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission’s treatment of Phillips’ objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of [the Colorado Anti-Discrimination Act] in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips’ willingness to sell “birthday cakes, shower cakes, [and] cookies and brownies,” App. 152, to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips’ case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers’ conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that “[t]his case is distinguishable from the Colorado Civil Rights Division’s recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed” when they refused to create the requested cakes. 370 P.3d, at 282, n. 8. In those cases, the court continued, there was no impermissible discrimination because “the Division found that the bakeries ... refuse[d] the patron’s request ... because of the offensive nature of the requested message.” *Ibid.*

A principled rationale for the difference in treatment of these two instances cannot be based on the government’s own assessment of offensiveness. Just as “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See *Matal v. Tam*,

582 U.S. ___, ___ - ___, 137 S.Ct. 1744, 1762-1764, 198 L.Ed.2d 366 (2017) (opinion of ALITO, J.). The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.²⁹⁹

Because this case was also litigated and resolved as free exercise one, the free speech doctrine that Justice Kennedy's opinion appears to invoke—viewpoint discrimination—did not apply.³⁰⁰ For this reason, his analysis is better understood as fundamentally pluralist. The opinion seeks an outcome where all varieties of conscience can coexist in a polity. Critically, it recognizes the dispute as fundamentally liturgical rather than practical. The liturgical aspect is which beliefs government celebrates as worthy of societal affirmation, or which are upheld as “orthodox.” The case presents no practical question because the baker's “willingness to sell ‘birthday cakes, shower cakes, [and] cookies and brownies’ to gay and lesbian customers”³⁰¹ ensures their general inclusion in goods and services. This gives credence to the opinion's conclusion that the key to resolving this debate must reflect tolerance, respect, and uniform access to goods and services.³⁰²

We can discern the same sensitivity to liturgicism and pragmatism in *Fulton*, a sequel to *Masterpiece Cakeshop* taking up the issue of whether the free exercise clause requires government to grant dissenting religious organizations an accommodation from general standards.³⁰³ This question arose from a dispute between a Roman Catholic foster care agency and the City of Philadelphia. Despite having contracted with the agency for over 50 years for the placement of foster children with foster families, the City of Philadelphia terminated its relationship with the agency. It did so when the foster agency refused, on religious grounds, to certify its compliance with a nondiscrimination provision in its contract that would have required it to place foster children with same-sex couples.³⁰⁴ The City of Philadelphia informed the foster agency that it would not work with it unless it would comply, and declined to grant it any exemption from that requirement. So that the foster agency could continue its role in social services in a manner consistent with its religious objections, the agency and three affiliated foster parents sued the City of Philadelphia.³⁰⁵ The lawsuit sought an injunction directing the City of Philadelphia, through its Department of Human Services, to continue referring children to CSS without requiring the agency to certify same-sex couples as foster recipients.³⁰⁶

²⁹⁹ 584 U.S. 636 – 638.

³⁰⁰ *Id.* at 631, 639 – 640 (noting that Philipps raised free speech arguments but resolving case on free exercise grounds). *But see* CHEMERINSKY, *supra* note 174, at 1322 (citing *Good News Club v. Milford*, 533 U.S. 98 (2001) as establishing that viewpoint discrimination doctrine governs limited-public-forum free exercise jurisprudence).

³⁰¹ *Id.* at 637.

³⁰² *Id.* at 640.

³⁰³ 593 U.S. at 535 – 538.

³⁰⁴ *Id.* at 526 – 530.

³⁰⁵ *Id.* at 531.

³⁰⁶ *Id.*

At the time of his confirmation hearing and early into his tenure, Chief Justice Roberts was thought to be an ally of gay rights like Justice Kennedy, based on his *pro bono* work in private practice.³⁰⁷ In addition, ahead of the U.S. Supreme Court's decision in *Obergefell*, his lesbian cousin Jean Podrasky framed Roberts as someone who understood the public tide in favor of same-sex rights.³⁰⁸ This reputation suffered because of his dissent in *Obergefell*, which made him appear heartless.³⁰⁹ Despite this aspect, legal commentary came to deride his opinion in *Fulton* more as evidence of Christian favoritism than homophobia.³¹⁰ That take is based on its apparent evasion of *Employment Div., Dept. of Human Resources of Ore. v. Smith*,³¹¹ the 1990 precedent establishing that government need not accommodate religion from laws of general applicability³¹² established on the back of an unpopular, minority religion.³¹³

However, Roberts' majority opinion emphasizes points indicating a desire to work out pragmatic and prudential pluralism. Like Justice Kennedy's opinion in *Masterpiece Bakery*, Chief Justice Roberts' opinion marshals facts that distill the dispute into a matter conscience and allay concerns about any material harm. We are assured that the foster agency's objections were only to certifying same-sex couples because of religious doctrine that marriage is "a sacred bond between a man and a woman"; the agency would happily certify gay or lesbian individuals as single foster parents and place gay and lesbian children.³¹⁴ Further, the foster agency had never been asked to certify a same-sex couple and stated that, if asked, it would simply direct any same-sex couple to one of over 20 other agencies in the City that do so.³¹⁵ So framed, the entire dispute was reduced to whether the City of Philadelphia had the right to decline an exemption based on the foster agency's aberrant views, ones in tension with society's "recognition that gay persons and couples cannot be treated as social outcasts or as inferior in dignity and worth."³¹⁶

³⁰⁷ Richard A. Serrano, *Roberts Donated to Help Gay Rights Case*, L.A. TIMES (August 4, 2005), <https://www.latimes.com/archives/la-xpm-2005-aug-04-na-roberts4-story.html>.

³⁰⁸ See Maura Dolan, *Chief Justice's Lesbian Cousin Will Attend Prop. 8 Hearing*, L.A. TIMES (March 24, 2013), <https://www.latimes.com/local/lanow/la-xpm-2013-mar-24-la-me-ln-prop.8-chief-justices-cousin-a-lesbian-will-attend-prop-8-hearing-20130324-story.html>.

³⁰⁹ See, e.g., Richard A. Posner, *Supreme Court Gay Marriage: John Roberts' Dissent in Obergefell Is Heartless*, SLATE (June 27, 2015), <https://slate.com/news-and-politics/2015/06/supreme-court-gay-marriage-john-roberts-dissent-in-obergefell-is-heartless.html>.

³¹⁰ See, e.g., Stephen M. Feldman, *The Roberts Court's Transformative Religious Freedom Cases: The Doctrine and the Politics of Grievance*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507 (2022).

³¹¹ 494 U.S. 872 (1990).

³¹² See *supra*, note 292, 593 U.S. at 543 (Amy Coney Barrett's concurrence in *Fulton* describing the precedent).

³¹³ Employment Division involved the ingestion of peyote as a Native American religious practice. For the perspective that Employment Division turns on the unpopularity of Native American religious practices, see Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L. J. 954, 1012-15, and 1020 (1998); Feldman, *supra* note 310, at 527-528.

³¹⁴ 593 U.S. at 530.

³¹⁵ *Id.*

³¹⁶ *Id.* at 542 (quoting *Masterpiece Cakeshop*, 584 U.S. at 631).

Chief Justice Roberts' opinion reasoned that, under circumstances where granting the foster agency an exemption would not deny any real services to same-sex couples, would respect the Catholic agency's beliefs that it was not seeking to impose on others, and would only serve to increase the number of available foster parents, it was unjust for the City to refuse.³¹⁷ This reasoning is unmistakably practical pluralist in the Roman mold.

Legal commentary has overlooked these decisions' pluralist pragmatism because it has focused on what they say about what the U.S. Supreme Court thinks of LGBT status: whether the Court imagines it as some second-tier right. The main reason cited for this is comparing sexual orientation to race,³¹⁸ which invites comparing *Masterpiece Cakeshop* and *Fulton* to the U.S. Supreme Court's opinion in *Bob Jones University v. United States*.³¹⁹ That case considered whether "nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine," qualify as tax-exempt charitable organizations.³²⁰ The majority opinion held that they do not because their practices are at odds with fundamental U.S. policy. But the pluralist lens that CGC offers allows us to reframe the issue in *Bob Jones University* toward grasping what *Masterpiece Cakeshop* and *Fulton* make clearer. Any accommodation of difference cannot undermine the legal order by creating exceptions swallowing the norm. The Court deciding the *Bob Jones University* litigation was aware of a social history marked by widespread, entrenched opposition to integration. Indeed, Chief Justice Warren E. Burger's majority opinion openly observes that

[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the 'separate but equal' doctrine of *Plessy v. Ferguson*, 163 U. S. 537 (1896), it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life," *Walz v. Tax Comm'n*, 397 U. S. 664, 673 (1970), or should be encouraged by having all taxpayers share in their support by way of special tax status.³²¹

Another section of the opinion weighing the schools' free exercise rights against the government interest in "eradicating racial discrimination in education" notes that the discrimination at issue "prevailed, with official approval, for the first 165 years of this Nation's constitutional history."³²² Based on this, the Court recognized the issue as whether the free exercise clause would create a loophole enabling dissenters to undermine the whole system. That, and not sententious

³¹⁷ *Id.* at 541 – 542.

³¹⁸ See, e.g., Ria Tabacco Mar, *The Colorado Cake Case Is as Easy as Pie*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/opinion/colorado-cake-first-amendment-gay.html>.

³¹⁹ 461 U.S. 574 (1983).

³²⁰ *Id.* at 577.

³²¹ *Id.* at 595.

³²² *Id.* at 604.

moralizing about the comparative ill of racism versus homophobia, is the enduring takeaway from *Bob Jones University*.

So, the issue in *Masterpiece Cakeshop* and *Fulton* is not whether same-sex couples have any place in society. Rather, it is about whether the law should allow government to use power for cudgeling outliers into orthodoxy. As discussed above in Section III.D, CGC has come to dispute whether this is ever the law's business. Should the facts informing the accommodation of Tradition in view of same-sex coexistence change—should society regress to its sordid recent past denying gay individuals a basic place in society—then CGC allows for different outcomes. Roman jurist Ulpian's principle to give each person their due³²³ would empower all levels of government to wield power to protect same-sex couples in securing basic temporal goods needed for their coexistence. In other terms, if the question is one of whether outsiders or a minority should generally enjoy goods and services, the answer is different. But where the question is merely liturgical, pluralism allows all minorities—including those who had previously been the dominant group—to sing their own tune.

V. CONCLUSION AND RECONCILIATION

The breadth of this Article requires a summary of its argument, and, finally, an explanation of how it aligns with my previous views. This Article is directed to those concerned that the inevitability of CGC, with its revival of the classical legal tradition based on natural law, spells the retrenchment of that pluralism which commoners have relied upon to coexist. It argued that CGC need not portend the end because the classical legal tradition includes a principle of subsidiarity that empowers commoners to form structures through which they can secure their place within a Traditional order. These structures are municipalities, a lower order of government whose role within Tradition is to help individuals commonly secure temporal goods through fact-specific, contextual regulation. This Article termed such a constitutionalism “subsidiary municipalism,” and argued that it provides a better account for the U.S. constitutional order's actual operation. It also identified five principles that subsidiarity implies into U.S. constitutionalism toward enabling municipalism to secure commoners' temporal goods. It applied the five principles to sketch how subsidiarity can forestall the disruption of commoners' gains that U.S. Supreme Court's decision in *Dobbs v. Jackson's Women Health Organization* appears to threaten. Lastly, this Article showed that subsidiary municipalism and its solicitude for pluralist coexistence is how one can better understand what the Roberts Court has been doing in its decisions about the clash of association rights and general order. All this was done to encourage pluralism's champions to focus on local government as a way forward.

What has CGC to do with the jurisprudence of trousered apes? It is here that I finally draw the connection. CGC benefits commoners by altering how U.S. constitutionalism understands law's function. Despite reintroducing broad principles informed by tradition at the expense of textual literalism, CGC restores

³²³ CGC MONOGRAPH, *supra* note 2, at 30. In the classical legal tradition, the ruler does this toward helping members to be part of a flourishing political community. *See id.* at 1.

the understanding of law as a species of practical reasoning rather than moralism. As Vermeule's writing makes clear, CGC accepts the ambition of using law to inculcate virtue.³²⁴ But CGC changes *how* law seeks to produce such. Its movement is away from what Vermeule rightly describes as the liturgicism of *Obergefell*, where law denounces bigotry and seeks to prescribe orthodoxy, and toward a reliance on law to create structures where different peoples can coexist amid varying understandings of how to achieve the good life. This shift makes all the difference for outsiders estranged from Tradition whose goal is to be left alone.

CGC's pragmatism is where alignment is found. The jurisprudence of trousered apes framed positivism and textualism as more accessible means by which the uninitiated can participate in a polity.³²⁵ CGC serves the same purpose by grounding law, displacing the idle sanctimony that my previous essay reacted against³²⁶ with a focus on what achieves sound outcomes, the focus of commoners.³²⁷ It is telling that, for all its engagement with Tradition, CGC unflinchingly upholds the pandemic eviction ban,³²⁸ so advancing *the* exercise of power inspiring my prior essay.³²⁹

In this vein, I point out another instance of consistency between the textualism and positivism defended in my prior essay and Vermeule's CGC framework. Legal principles shorn of what this Article calls moralism and what Vermeule denominates as liturgicism³³⁰ are narrower and therefore more adaptable. They are narrower because they propose structures and institutions rooted in understandings that can be grasped through the study of historical or sociological materials. Vermeule's notion of rational arbitrariness is not the imposition of foreign mores animating the concern articulated in the prior essay.³³¹ Drawing upon the history covered here, an outsider can ascertain these principles and, as this Article submits, apply them to protect their own interests.

CGC's reorientation of the Anglo-American tradition to focus on structural and institutional principles has an added benefit for commoners. It directs them away from constitutional litigation as their salvation to administrative and municipal law for their enfranchisement. Put somewhat differently, it revives local bodies as organs of the common good, restoring legislatures and administrative bodies as the vehicles of social harmony. In so encouraging this approach, this Article acknowledges real differences between rights under liberal constitutionalism and the prudential and pragmatic liberty under subsidiarity municipalism. The practical liberty within municipalities is not the same thing as the universal affirmation of bodily autonomy as a good. A local community's acceptance in is not the same thing as a continental polity's celebration. But this Article submits that subsidiarity municipalism is more stable and enduring because it depends on persuasion through demonstration and dialogue rather than the falsehood of conquest and imposition.

³²⁴ See *supra*, note 250.

³²⁵ Louis, *supra* note 1, at 158-159.

³²⁶ *Id.* at 153.

³²⁷ *Id.* at 165.

³²⁸ CGC MONOGRAPH, *supra* note 2, at 42 (observing that CGC affirms public health measures such as vaccine mandates).

³²⁹ See *supra*, note 6 and the accompanying text.

³³⁰ See *supra*, note 207.

³³¹ Louis, *supra* note 1, at 158.

In a sense, progressive legalism lapsed into liturgicism because it is seductive: ordering orthodoxy through universal injunctions *feels* like victory. But since life happens on the ground,³³² law enlivens only through people, many of whom may not be what we wish but who nonetheless remain the neighbors with whom we live our lives.

Lastly, this Article acknowledges that subsidiary municipalism is the exact practical and prudential pluralism Vermeule regards as temporary, and that other scholars regard as political rather than legal.³³³ Such raises a fear that it replaces solidity with fluid arrangements. But I do not see how pluralistic coexistence can ever avoid such fluidity as it happens by muddling through. In light of human messiness, the difference between an order maintaining peace under factual circumstances and one supposedly based on outcomes frozen in judicial decisions and statutes must be more rhetorical than substantive. For rights must always be interpreted to be applied; and when they are, they are interpreted by people of an age. To explain this sentiment with one final Catholic reference, the current pontificate has been described as the search for unity over conflict.³³⁴ Such unity must be messy because it is the symphony of opposites, or a unity of people as they are, in their initial and apparent incompatibility.³³⁵ The law of a nation whose official seal declares unity out of pluralism³³⁶ will not be anything else. This Article sketches one potential path that legal tradition has taken through our unique mess.

³³² *Id.* at 169.

³³³ *Supra*, note 185 and accompanying text.

³³⁴ MASSIMO BORGHESI, *THE MIND OF POPE FRANCIS: JORGE MARIO BERGOGLIO'S INTELLECTUAL JOURNEY* 105-06 (2018). *See also* THOMAS GILBY, *BETWEEN COMMUNITY AND SOCIETY* 14 (1953) (noting need of theory to create a stable balance and synthesis of distinct interests).

³³⁵ BORGHESI, *supra* note 334, at 105-06.

³³⁶ The famous *E Pluribus Unum*. *See* 1 STAT. 68, Chap XIV.

WONDROUS DARK: VISUAL ART AS FREE SPEECH

Thomas Halper*

ABSTRACT

There is general agreement that art is protected by the First Amendment. But what is art? As the nature of art has itself radically evolved, the notoriously unanswerable question has become even knottier. Courts have addressed the issue with a mélange of old fashioned and ill fitting criteria, but one Supreme Court dissenter has proffered an alternative, implicitly accepting the theory of the renowned art critic and philosopher, Arthur Danto.

KEYWORDS

Art, First Amendment, Danto

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“I conceive . . . as to the business of being profound, that it is with writers as with wells [W]hen there is nothing in the world at the bottom besides dryness and dirt, though it is but a yard and a half under ground, it shall pass, however, for wondrous deep, upon no wiser reason than because it is wondrous dark.”

Jonathan Swift¹

I. INTRODUCTION

We take it for granted that art is connected with freedom. The cliché romantic artist, whether a free spirit² or a brooding loner,³ is very much his own person driven by his own vision. He may celebrate or ridicule those in power; he may radically innovate or follow well-trod conventions; he may prowl a Chelsea gallery as a rich man or dine on canned sardines in a garret. Whether talented, successful or a struggling failure, the cliché life of the artist epitomizes the life of a free person.

Whatever his status, the cliché artist is beset by self-interested adversaries, petty predators barking, scratching, grasping to pull him down, and, worse yet, government officials alarmed at his independence and refusal to conform. For them, the freedom of an artist is a threat or a nuisance but certainly nothing to be indulged. Even Plato joins the attack, conceiving art as imitative or mimetic, and therefore inferior to what it was imitating; indeed, because he saw tangible reality as merely a copy of ideal forms, he considered art merely a copy of a copy that leads us away from truth. Plato would have banished art from his Republic as a corrupting force.⁴

With 2.57 million artists in the American workforce⁵ and few signs of Rembrandts and Velasquezes among them, it is evident that freedom does not guarantee art of quality. On the other hand, it is commonly thought that the absence of freedom means that it is hard to have real art at all. Freedom is necessary, if not sufficient, for the creation of worthy art. So says the cliché.

This may not be true. Many of the greatest visual artists labored under tyrannies – consider the Renaissance masters in the time of the Medici⁶ -- suggesting that in certain cases, the absence of freedom might actually conduce to creativity of a high level.⁷ But the cliché, unsullied by facts, remains popular, like junk food.

¹ JONATHAN SMITH, *A TALE OF A TUB* 186 (2009) (1704).

² JOYCE CARY, *THE HORSE'S MOUTH* (1944).

³ IRVING STONE, *LUST FOR LIFE* (1934).

⁴ PLATO, *REPUBLIC* 80-85 (Francis M. Cornford trans. 1941) (Stephanus *392c-398b).

⁵ Randy Cohen, *Artists in the U.S. Workforce 2006-2020*, Am. for the Arts (Mar. 2021), <https://www.americansforthearts.org/by-program/reports-and-data/legislation-policy/naappd/artists-in-the-us-workforce-2006-2020>. This includes eleven occupational categories, which the United States Bureau of Labor Statistics believes “only capture[s] a portion of all artists in the workforce.”

⁶ To take an extreme example, it is said that Fra Filippo Lippi was imprisoned by Cosimo de Medici until he completed a painting demanded of him. Sayre MacNeil, *Some Pictures Come to Court*, in *HARVARD LEGAL ESSAYS* 247 (Roscoe Pound ed., 1934).

⁷ Aleksandr Solzhenitsyn believed that the free societies in the West encouraged a shallow life, focusing on consumerism and gossip; authoritarian systems compelled many citizens to consider such timeless questions as how shall I live? See ALEKSANDR SOLZHENITSYN, *A WORLD SPLIT APART* (1978).

We also take it for granted that free expression is immensely valuable. Why? Because free expression offers the best path to discovering truth.⁸ Because free expression is essential to political accountability.⁹ Because free expression improves “all life-affecting decisions.”¹⁰ These diverse rationales all share a common element, a belief in the value of communication. In the marketplace search for truth, communications collide; in the pursuit of political accountability, communications between those in power and their critics collide; and in improving life-affecting decision making, communications among the countless interested parties collide.

The results of all these collisions may not be pretty nor are they always productive. With free expression, truth may win out in the long run, but as Keynes observed, “In the long run, we are all dead.”¹¹ Certainly, psychology has taught that there are powerful emotional bases for belief that can easily overwhelm considerations of truth.¹² And yet, overall, we believe with Holmes that “the best test of truth is the power of the thought to get itself accepted in the competition of the marketplace.”¹³ Not the perfect test, but merely the best among those available. As to accountability, widespread political ignorance or apathy – based in rational calculations¹⁴ – has left us skeptical. Voters seem to credit or blame office holders for matters quite outside their control and to disregard matters that office holders can affect. Yet we still value “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹⁵

An additional justification of free expression, highly esteemed by Thomas Emerson, “probably the leading modern theorist of free speech,”¹⁶ is “assuring individual self-fulfillment.”¹⁷ “Man,” he argues, is distinguished by his “powers to reason and to feel,” which implies his “right to form his own beliefs and opinions [and] to express these beliefs and opinions. . . . Hence, suppression of . . . expression is an affront to the dignity of man, a negation of man’s essential nature.”¹⁸

Again, this may not be entirely persuasive. If Emerson’s test of value is whether an attribute occupies a place as a fundamental human quality, perhaps the urge to dominate (Augustine’s *libido dominandi*) is as fundamental as the powers to reason or feel, perhaps, ironically the urge to suppress acts as a corollary of

⁸ JOHN MILTON, *AREOPAGITICA* (1644).

⁹ Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUNDATION RES. J. 521 (1977).

¹⁰ Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 604 (1986). More specifically, free speech is said to improve government decision making, especially in wartime. See, e.g., LUTHER GULICK, *ADMINISTRATIVE REFLECTIONS FROM WORLD WAR II* (1948).

¹¹ JOHN MAYNARD KEYNES, *A TRACT ON MONETARY REFORM* 80 (1923).

¹² For example, on confirmation bias, see Matthias & Megan A. K. Peters, *Confirmation Bias: Without Rhyme or Reason*, 199 SYNTHESIS 2757 (2020); on present bias, see Ted O’Donoghue & Matthew Rabin, *Present Bias: Lessons Learned and to Be Learned*, 105 AM. ECON. REV. 273 (2015).

¹³ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹⁴ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 21-36 (1956).

¹⁵ *N.Y. Times v. Sullivan*, 376 U.S. 259, 270 (1964) (Brennan, J.).

¹⁶ Redish, *supra* note 10, at 591.

¹⁷ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, at 878-79 (1963).

¹⁸ *Id.* at 879. Relatedly, free speech may be a natural right created to permit us to praise God and to connect with other people, thus allowing us an escape from an otherwise intolerable loneliness.

the powers to reason and to feel. It is the ubiquitous presence of this urge, after all, that is the chief reason we bother about free expression or have the First Amendment. And if free expression may stimulate the powers to reason and feel, it must be admitted that many things stimulate these powers and receive no special constitutional protection, like cooking smells drifting from a kitchen, watching a sporting event or encountering a beautiful person on the street. It must also be said that free expression, like a snake devouring its tail, may stimulate the urge to suppress; your right to say something offensive may trigger my determination to shut you up. Like the other rationales for free expression, the goal of self-fulfillment, Emerson emphasizes, presumes “the right to express these beliefs and opinions. . . . Otherwise they are of little account.”¹⁹ Which leads us to the connection between art and communication.

II. ART AND COMMUNICATION

When we ask why it is that we have a First Amendment, do the classic defenses of free speech implicate art? If the rationales all focus on communication, does art necessarily presume a communicative purpose? Tolstoy thought that the “activity of art is based on the capacity of people to infect others with their own emotions and to be infected by the emotions of others.”²⁰ If the work of art is shown to someone not the artist, it would seem that the point is to communicate something.

What does this communication consist of? Sometimes, the answer is concrete and obvious. Jenny Holzer’s “Truism: Abuse of power should come as no surprise,” a lithograph consisting of thirty-nine maxims, communicates with a directness of a bumper sticker. Some images also are so embedded in common experience that they communicate clearly and unambiguously, like a swastika for Nazism and a Star of David for Judaism. But sometimes, the answer is more problematical, as with Picasso’s “Guernica,” with its howling people and terrified horse. If the viewer brings a certain knowledge, she will understand that it is a *cri de coeur* responding to a German air attack on the Spanish city of Guernica during the Spanish Civil War; if the viewer lacks this knowledge and sees the painting in isolation, it may communicate to her merely that something terrible has taken place or is threatened. Sometimes, communication is more problematical still, as with Mark Rothko’s color field paintings that may communicate a vague mood or perhaps not even that.²¹ Thus, the rejection of abstract expressionism by Communists and Nazis because it was “too difficult to inject effective propaganda into.”²²

¹⁹ *Id.*

²⁰ LEO TOLSTOY, WHAT IS ART? 228 (Aylmer Maude trans., 1930) (1898).

²¹ On the other hand, Kierkegaard imagined a monochromatic red painting, “The Israelites Crossing the Red Sea,” of which the color represented the drowned soldiers of Pharaoh’s army. A distinguished art critic observed that if the painting had instead been titled “Red Square” (a Moscow landscape), “Nirvana” (a Buddhist sacred work) or “Red Table Cloth” (a still life), its subject would transform it into a different painting. ARTHUR C. DANTO, THE TRANSFIGURATION OF THE COMMONPLACE: A PHILOSOPHY OF ART 1 (1981). See also LYDIA GOEHR, RED SEA-RED SQUARE-RED THREAD: A PHILOSOPHICAL DETECTIVE STORY (2021).

²² CLEMENT GREENBERG, ART AND CULTURE: CRITICAL ESSAYS 19 (1961). Relatedly, the early American Puritans rejected art as a frivolous distraction. DAVID R. BRIGHAM, PUBLIC

On the other hand, a visual artist might retort that expecting verbal type communication from a painting is like expecting a dog to fly like a bird. Thus, when one sympathetic lawyer called abstract art “non-ideational,”²³ he may have inadvertently meant that it speaks in an unfamiliar language. The nature of visual art communication, in other words, is different – not inferior but simply different – from written or spoken communication. Thus, Justice Souter declared that if a “particularized message” were needed to implicate First Amendment protection, it “would never reach the unquestionably shielded painting of Jackson Pollock”²⁴ (though Souter never explained why this would be so).²⁵

Cumulatively, however, it has been argued, that art has had substantial social effects. For example, Daniel Bell believed that modern art, confronting established norms of rationality and celebrating hedonistic subjectivity and immediate gratification, has contributed to undermining the traditional work ethic and morality that undergird Western capitalism.²⁶ On the other hand, notwithstanding the bromide that “artistic expression . . . is central to the cultural and political vitality of democratic society,”²⁷ it is not exactly crystal clear that Pollock’s drip paintings are central to the cultural and political vitality of the United States. Similarly, Marcia Hamilton contended that visual art is protected by the First Amendment “because its flourishing furthers the intangible and unquantifiable value of increasing the people’s capacity to resist hegemony.”²⁸ When one considers how postmodern artists have distanced their work from laypeople and how often artists have supported hegemony, the rationale collapses under the weight of sentimental wishful thinking. Such skepticism perhaps contributed to Bork’s position that only political speech merited First Amendment protection, leaving art worthy but unprotected.²⁹

Does art, then, require a communicative purpose? It is obvious that art exists as a mode of self-expression,³⁰ and if the artist is expressing something, we assume that the artist is expressing it to someone, even if to an abstract idealized viewer. At a conceptual level, cubism, for instance, may be viewed as a communication –

CULTURE IN THE EARLY REPUBLIC: PEALE’S MUSEUM AND ITS AUDIENCE 18-19 (1995); JOHN DILLENBERGER & CLAUDE WELCH, PROTESTANT CHRISTIANITY: INTERPRETED THROUGH ITS DEVELOPMENT 105 (1954).

²³ James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 499 n. 45 (2011).

²⁴ *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

²⁵ This echoed Justice Sanford’s applying the free speech guarantee to the states, offering no justification whatever. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). See Thomas Halper, *Lear’s Daughters? Unenumerated Fundamental Rights and the Constitution*, 13 BRIT. J. AM. LEGAL STUD. 1, 7 (2024).

²⁶ DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 54-76 (1976).

²⁷ David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 739 (1992).

²⁸ Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 112 (1996).

²⁹ Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, at 27-28 (1971).

³⁰ Collingwood thought the defining element in art was its expressing the emotions of the artist. R.G. COLLINGWOOD, *THE PRINCIPLES OF ART* 117 (1938). However, there are phenomena that we consider art but do not express emotions (like much of conceptual art) and phenomena that express emotions but are not considered art (like screaming).

perhaps a hostile and incendiary communication – with the naturalistic tradition, as well as with specific artists and viewers.

However, art need not always be communicative in intent. Dutton, for instance, believed that the aesthetic sense is innate and driven by “an intention to create something you’re going to want to look at after you’ve finished”³¹ – the artist’s communication, in this sense, is with himself. Much of what is called outsider art or *art brut* also may be characterized as self-expression, though it was made with no interest in communication. Perhaps the most famous outsider artist, Henry Darger, a hospital janitor, produced an enormous illustrated novel that became known only after his death.³² Pure self-expression (like Darger’s) would be unlikely to generate efforts at suppression, as no one but the artist would be aware of the art; only the posthumous efforts of others publicized his work, granting it a communicative dimension he did not desire or foresee. During Darger’s life, First Amendment protection would have been superfluous, for the issue of suppression or punishment would never have arisen. On the other hand, if his work was not communicative in intent, it surely was communicative in effect, which accounts for its popularity.

What has the First Amendment to do with art? The answer is: it depends. It depends upon the art and it depends upon the audience. Can art help in the search for truth or in holding rulers accountable? Consider Goya’s series of etchings, “The Disasters of War,” depicting the subject with extraordinary power. Or Daumier’s “The Legislative Belly,” ridiculing members of France’s National Assembly. Much of today’s art, too, has been characterized as “moralizing message-delivery systems,” specializing in currently fashionable notions of social justice.³³ These self-consciously didactic works were intended to convey rather specific messages and found audiences who would easily understand them. Much art, however, is not like that (think the work of Barnett Newman or Cy Twombly).

Even here, however, one might claim that abstract art communicates both the artist’s determination to paint what he likes, no matter how unconventional, and the society’s commitment to his freedom to do so. By contrast, under Stalin’s stifling, unrealistic social realism, art was reduced to propaganda presenting unending confirmations of the successes of Soviet society as a socialist utopia. “Art belongs to the people,”³⁴ said Lenin, by which he meant that it belonged to the party. All this suggests that art’s implicit message may communicate far more powerfully than what literally appears on canvas. Can art, then, enhance our life-affecting decisions? Some viewers doubtless will find that it opens up new ways of seeing themselves or their society. But probably art simply is not important enough to most people to inform such practical life-affecting decisions as those on marriage, occupation, or place to live, let alone such broader questions as how one shall live one’s life or what kind of person one should be.

³¹ DENIS DUTTON, *THE ART INSTINCT: BEAUTY, PLEASURE, AND HUMAN EMOTION* 7 (2009).

³² JILL ELLEDGE, *HENRY DARGER, THROWAWAY BOY: THE TRAGIC LIFE OF AN OUTSIDER* (2013). Zangwill believes that the theory of art requires “no reference to an audience.” Nick Zangwill, *Art and Audience*, 57 *J. AESTHETICS & ART CRITICISM* 315, 330 (1999).

³³ Alice Gribbin, *The Great Debasement*, *TABLET*, May 26, 2022.

³⁴ Qtd. in KLARA ZETKIN, *REMINISCENCES OF LENIN* 14 (1929).

III. WHAT IS ART?

Whatever the Framers thought about art, it is obvious that in recent years the concept has undergone a revolution. Once upon a time, art seemed to have a narrative purpose. Consider Hieronymus Bosch's "Last Judgment" that warns of the horrors of eternal damnation or Jacques-Louis David's "Napoleon Crossing the Alps," which celebrates the subject's military victories. The art work encounters the viewer's experience: we come to the paintings understanding that Bosch is referring to hell, not simply a nightmare, and that Napoleon was a great general, not a cowboy in fancy dress. Yet, it must be said that much of what today's art communicates is incomprehensible to the uninitiated general public, which is perhaps the point. As Habermas put it, "Modernity revolts against the normalizing functions of tradition; modernity lives on the experience of rebelling against all that is normative."³⁵

Unfortunately, we cannot avoid the notorious quagmire, what is art, the "central,"³⁶ "most venerable,"³⁷ and "most vexing"³⁸ problem of aesthetics and "one of the central questions of analytic philosophy."³⁹ "Art" derives from the Latin "ars," which also signifies skill. We used to assume that art required skill. Piero Manzoni canned thirty grams of his own excrement in "Merde d'Artiste"; it was purchased by the Tate, England's premier venue for contemporary art, for \$61,000.⁴⁰ Chris Burden's "Shoot" consisted of a video showing him shot in the left arm by a friend using a .22 rifle; "Through the Night Softly" saw him crawling across broken glass in his underwear; and "Trans-Fixed" depicted him nailed to a Volkswagen.⁴¹ We also used to assume that the artist made the art. Sherrie Levine's celebrated exhibit, "After Walker Evans," consisted of photographs of reproductions of Evans' photographs;⁴² Richard Prince's photographs of Marlboro cigarette advertisements brought over \$3,000,000 at auction.⁴³ At the very least, we used to assume that the art was something. Salvatore Garau's sculpture, "La Sono" (Italian for "I am") was invisible; it sold for \$18,300;⁴⁴ a prestigious London gallery exhibited invisible

³⁵ Jurgen Habermas, *Modernity: An Incomplete Project*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 4* (Seyla Ben-Habib trans., Hal Foster ed., 1983).

³⁶ CLIVE BELL, *ART 3* (1914).

³⁷ Jerrold Levison, *Defining Art Historically*, 19 *BRIT. J. AESTHETICS* 232 (1979).

³⁸ Monroe Beardsley, *Redefining Art*, in *THE AESTHETIC POINT OF VIEW 298* (Michael J. Wreen & Donald M. Callen eds., 1982).

³⁹ Noel Carroll, *Identifying Art*, in *INSTITUTIONS OF ART: RECONSIDERATIONS OF GEORGE DICKIE'S PHILOSOPHY 4* (Robert J. Yanal ed., 1994).

⁴⁰ *Tate's Tinned Art Leaves Bad Smell*, *SYDNEY MORNING HERALD* (July 1, 2002).

⁴¹ *Dangerous Art: The Weapons of Performing Artist Chris Burden*, *THE ART STORY BLOG* (2022),

<https://www.theartstory.org/blog/dangerous-art-the-weapons-of-performance-artist-chris-burden/>.

⁴² Howard Singerman, *Sherrie Levine's Art History*, 101 *OCT. 96* (2002). There was no copyright issue because Evans had been employed by the government, leaving his photographs in the public domain.

⁴³ Alex Novak, *Richard Prince's Marlboro Man Sets World Record of \$3.4 Million for Photo at Auction*, *E-PHOTO NEWSLETTER* (iPhoto Central, <https://www.iphotocentral.com/news/article-view.php/148/139/818>), Jan. 3, 2008.

⁴⁴ Taylor Dafoe, *An Italian Artist Auctioned Off an 'Invisible Sculpture' for \$18,300. It's Made Literally of Nothing*, *ARTNET* (June 3, 2021), <https://news.artnet.com/art-world/italian-artist-auctioned-off-invisible-sculpture-18300-literally-made-nothing-1976181>.

works by Andy Warhol, Yves Klein, and Yoko Ono.⁴⁵ The eminent conceptual artist and sculptor, Sol LeWitt, “a lodestar of modern American art,”⁴⁶ claimed to have buried a metal cube in the ground, but doubt remains that he actually did so;⁴⁷ what was important was not whether he buried the cube, but instead the public’s response to his claim.

All this underscored a complaint by Duchamp about

too great an importance given to the retinal. . . . it’s been believed that painting is addressed to the retina. That was everyone’s error. . . . Before, painting had other functions: it could be religious, philosophical, moral. . . . Our whole century is completely retinal. . . . It’s absolutely ridiculous. It has to change.⁴⁸

The point of all these works was to repudiate and destroy traditional artistic conventions – for example, the tradition that held that “the painter is concerned solely with representing what can be seen”⁴⁹ -- and it has succeeded.

What, then, is art? Conventional answers have tended to focus on the artwork, the process of creating the artwork or the viewer’s experience in perceiving the artwork. More recently, several philosophers have proposed clusters of attributes,⁵⁰ imagination,⁵¹ social significance and harmony,⁵² “recognition criteria”⁵³ or “seven conditions,”⁵⁴ each of which constitutes a list of attributes that may be found in art. Some of these lists may be quite long.⁵⁵ A work of art, from this perspective, is defined as something that meets some or all or some of these tests. The logic is clear. As there is a consensus that certain things are works of art, we can identify the characteristics of these consensus works and apply them inductively to other works to determine whether they, too, are works of art.

Others emphasize the historical context, in which “the artist’s way of seeing [has] been conditioned by the world of art [and the] struggle with the forms which

⁴⁵ Andrew Barnes, *Blank Canvas: London Gallery Unveils ‘Invisible’ Art Exhibit*, INDEPENDENT, May 18, 2012, <https://www.independent.co.uk/arts-entertainment/art/news/blank-canvas-london-gallery-unveils-invisible-art-exhibition-7767057.html>.

⁴⁶ Michael Kimmelman, *Sol LeWitt, Master of Conceptualism, Dies at 78*, N.Y. TIMES, Apr. 9, 2007, <https://www.nytimes.com/2007/04/09/arts/design/09lewitt.html>.

⁴⁷ “Buried Cube,” *Sol LeWitt*, ART**IRIS (Oct. 29, 2013), <https://artiris.wordpress.com/2013/10/29/buried-cube-sol-lewitt/>.

⁴⁸ Qtd. in PIERRE CABANNE, *DIALOGUES WITH MARCEL DUCHAMP* 43 (Ron Padgett trans., 1971).

⁴⁹ LEON BATTISTA ALBERTI, *ON PAINTING* 43 (John R. Spencer trans., 1970) (1435).

⁵⁰ Berys Gaut, *The Cluster Account of Art Defended*, 45 BR. J. AESTHETICS 273 (2005); Francis Longworth & Andrea Scanantino, *The Disjunctive Theory of Art: The Cluster Account Reformulated*, 50 BR. J. AESTHETICS 151 (2010).

⁵¹ Dutton, *supra* note 31, at 51.

⁵² De Witt H. Parker, *The Nature of Art*, in *THE PROBLEMS OF AESTHETICS* 104 (Eliseo Vivas & Murray Krieger eds., 1953).

⁵³ Denis Dutton, *A Naturalist Definition of Art*, 64 J. AESTHETICS & ART CRITICISM 367 (2006).

⁵⁴ E.J. Bond, *The Essential Nature of Art*, 12 AM. PHIL. Q. 177 (1975).

⁵⁵ *E.g.*, Gaut lists ten properties. Berys Gaut, *Art as a Cluster Concept*, in *THEORIES OF ART TODAY* 28 (Noel Carroll ed., 2000).

others have imposed on life.”⁵⁶ The artist, looking both backward and forward, labors in an historical process.⁵⁷

However, taking past definitions of art as given does not really inquire as to what art is, for the lists cannot avoid a key problem with enumerative definitions: the absence of principles of inclusion and exclusion. An additional practical problem is that the criteria are so numerous that the whole enterprise becomes intellectually unwieldy. How many tests need to be met? How closely must they be met? Must they be rigid to reflect enduring principles, in which case they will be overtaken by change and discarded as irrelevant? Or must they be flexible to accommodate change, in which case they will be so vague that their utility is undermined?

Another approach singles out art’s functional aesthetic character, as in Panovsky’s definition of art as a “man-made object designed to be experienced aesthetically.”⁵⁸ The distinctive marker for him, as for many others,⁵⁹ is the intention of the artist that inheres in the object.⁶⁰ Yet as art now is thought to include natural objects repurposed as art, this definition will strike us as passé. Relatedly, Bloomsbury’s Clive Bell focuses on art’s capacity, through beauty or the nature of the object, to evoke a “peculiar emotion [in] all sensitive people.”⁶¹ All great art objectively partakes of the “significant form,” which defies precise definition but which we can subjectively experience as an “aesthetic emotion.” (“We have no other means of recognizing a work of art than our feeling for it.”⁶²) On the one hand, Bell’s intense intuitionism downplays the role of the critic. (“To appreciate a work of art we need bring with us nothing from life, no knowledge of its ideas or affairs, no familiarity with its emotions . . . for a moment we are shut off from human interests.”⁶³) On the other hand, in highlighting the role of sophisticated elites, Bell foreshadowed a more modern focus, specifically, the work of Arthur C. Danto, “one of the most influential and prolific philosophers of art of the second half of the twentieth century.”⁶⁴

In approaching the old chestnut, what is art? Danto observed that new technologies, like photography and movies, had drastically reduced the need for representational or imitative art, leading artists to abandon that traditional format, so that the “whole main point of art in our [twentieth] century was to pursue the question of its own identity.”⁶⁵ Self-conscious art, for example, examined the process

⁵⁶ ANDRE MALRAUX, *VOICES OF SILENCE: MAN AND HIS ART* 281 (Stuart Gilbert trans., 1978).

⁵⁷ GEORGE KUBLER, *THE SHAPE OF TIME: REMARKS ON THE HISTORY OF THINGS* 35 (2008); Jerrold Levinson, *Defining Art Historically*, 19 *BRIT. J. AESTHETICS* 232, 234 (1979).

⁵⁸ ERWIN PANOVSKY, *MEANING IN THE VISUAL ARTS* 14 (1955).

⁵⁹ *E.g.*, CHRISTY MAG UIDHIR, *ART AND ART-ATTEMPTS* 22-25 (2013); Paul Bloom, *Intention, History, and Artifact Concepts*, 60 *COGNITION* 1 (1996).

⁶⁰ PANOVSKY, *supra* note 58, at 11-13.

⁶¹ BELL, *supra* note 36, at 6; Beardsley, *supra* note 38, at 19; Frank Sidley, *Aesthetic Concepts*, 68 *PHIL. REV.* 421 (1959); DAVID HUME, *OF THE STANDARD OF TASTE*, IN *ESSAYS MORAL, POLITICAL, LITERARY* (Eugene F. Miller ed., rev. ed., 1987) (1759).

⁶² BELL, *supra* note 36, at 8.

⁶³ *Id.* at 27.

⁶⁴ John Erik Hmiel, *Art and Indiscernibility: Arthur C. Danto and the Dynamics of Analytical Philosophy*, 19 *MOD. INTEL. HIST.* 1157 (2022); Peter Osborne, *Interview Arthur C. Danto: Art and Analysis*, 90 *RADICAL PHIL.* 33 (Feb. 1998).

⁶⁵ Arthur C. Danto, *The End of Art*, in *THE DEATH OF ART* 30 (Berel Lang ed., 1984).

of visual understanding in cubism, as well as color and form in abstraction.⁶⁶ Freed from traditional constraints, the artist was now liberated, resulting in a pluralistic burgeoning of artistic visions. This is not exactly art for art's sake – it is really art for the artist's sake – for art now needed to have no subject outside itself. Indeed, “it was no longer clear that we could pick the artworks out from the non-artworks all that easily.”⁶⁷ Thus, for Danto “virtually all there is in the end is theory, art having finally vaporized in a dazzle of pure thought about itself, and remaining, as it were, solely as the object of its own theoretical consciousness.”⁶⁸

At a gallery, Danto spied Andy Warhol's famous “Brillo Box,” and “In a moment of revelation, everything becomes clear.”⁶⁹ Warhol's “Brillo Box,” deliberately virtually indistinguishable from the real thing,⁷⁰ is somehow art, and the real Brillo box is not. How can this be? Danto concludes that “if there were no visible differences, there had to have been *invisible* differences. . . works of art *embodied meanings*.”⁷¹ Thus, “one could not tell by looking” if something were art or not.⁷² One would have to know which Brillo box contained an embedded meaning?⁷³ How to know? Anything (or nothing) can be art. “To see something as art requires something the eye cannot descry – an atmosphere of artistic theory, a knowledge of the history of art, or artworld.”⁷⁴ In short, it is the artworld (chiefly, critics) which assigns and discovers meaning, and it is the artworld which determines what art is. A dead starfish on the beach is a dead starfish, but hang it on a critic's wall, and as if by magic, it becomes art. A neck tie with blue paint produced by a child may be “indiscernible” from one produced by Picasso, but only the Picasso tie qualifies as a work of art.⁷⁵ Similarly, if we came upon Robert Gober's “Bag of Doughnuts” on the sidewalk, we would consider it trash; at the Paula Cooper Gallery, it was considered art.⁷⁶ Danto compares the “transformative procedure” to

⁶⁶ *Id.* at 20-21.

⁶⁷ Arthur C. Danto, *The End of Art: A Philosophical Defense*, 37 *HIST. & THEORY* 127, 129 (1998).

⁶⁸ Danto, *supra* note 65, at 31. Danto here ironically sounds an uncanny echo of Tom Wolfe's diatribe against the art establishment. “Art made its final flight, climbed higher and higher in an ever-decreasing tighter-turning spiral until, with one last erg of freedom, one last dendritic synapse, it disappeared up its own fundamental aperture . . . and came out the other side as Art Theory! Art theory pure and simple, words on a page, literature undefiled by vision, flat, flatter, flattest, a vision invisible, even ineffable, as ineffable as the Angels and the Universal Souls.” See TOM WOLFE, *THE PAINTED WORD* 107-08 (1975).

⁶⁹ Danto, *supra* note 67, at 133.

⁷⁰ Hyper-realistic art, of course, had a long historical pedigree, as in the still lives of Chardin and the *trompe l'oeil* of William Harnett. In truth, Warhol's Brillo box was indistinguishable from a real Brillo box only from a distance.

⁷¹ ARTHUR C. DANTO, *WHAT ART IS* (2013).

⁷² Danto, *supra* note 67, at 130.

⁷³ *Id.* at 141.

⁷⁴ Arthur C. Danto, *The Artworld*, 61 *J. PHIL.* 571, 580 (1964). Similarly, Kant thought that aesthetic judgment is a function of the viewer, not the object, and that subjectivity would be tempered by the tendency of cultivated persons to agree on these judgments. IMMANUEL KANT, *CRITIQUE OF JUDGMENT* 74-81 (J.H. Bernard trans., 1951).

⁷⁵ DANTO, *supra* note 21 at 40.

⁷⁶ A critic and artist, Ed Brzezinski, reported, “I noticed this bag of doughnuts sitting on a pedestal. . . . I figured somebody had bought them and then gotten tired of them. So I

“something like baptism . . . in the sense of . . . giving a new identity, participation in the community of the elect.”⁷⁷

Of course, what makes these transformative procedures work is the faith of the audience. Initially, the public was dismissive of pop art; decades later, it has come to accept it. Is this because it now finds meaning in Warhol’s “Brillo Box” or merely because pop art has become so familiar and unexceptional that the public (which rarely pauses to consider aesthetic queries) has gotten used to it? For Danto, the question hardly matters, as what counts is the artworld’s imprimatur from which societal acceptance flows.

Danto concedes that the real Brillo box is “about something – Brillo – and embodies its meaning, “ namely, that it contains steel wool cleaning pads. Danto adds that “the design of the Brillo cartons is exceedingly ingenious.”⁷⁸ (The boxes were designed by James Harvey, an abstract artist who also produced commercial art, and died at age thirty-six a year after Warhol’s exhibit.) The point of the cartons, indeed, of marketing generally, is to convey meaning.

But Danto warns us that there is meaning and there is meaning; “the questions Warhol raises are philosophical questions,” whereas the Brillo box as a piece of commercial art merely “strives by rhetorical means to make Brillo preferable to other soap pads.”⁷⁹ Danto here seems to assume that meaning is a function of the intention of the creator, but plainly this need not be so. It is a commonplace for scholars to discover meanings in practices and objects of which their creators were entirely ignorant. For example, movie critics have located racist⁸⁰ and misogynist⁸¹ themes in films, whose makers were quite oblivious to the issues. Thus, Danto brushes aside the possibility that commercial design may also raise philosophical questions, for example, questions concerning aesthetics, perception, and memory or questions concerning the roles of women, the value of cleanliness, and the pull of consumerism. If one searches for philosophical meaning, it is nearly always possible to find it.

Moreover, the line between fine and commercial art may be blurrier than Danto postulates. What to make of Toulouse-Lautrec’s nightclub and theatre posters that, like Brillo boxes, had a commercial purpose, namely, to attract audiences to the Moulin Rouge? Or Warhol’s drawings of shoes that began as advertisements for I. Miller and ended in an exhibition at the Tate? Would Danto dismiss them, too?

On the other hand, one might argue that neither Brillo’s nor Warhol’s Brillo box is a work of fine art. One is merely a Brillo box, and the other merely a copy.

For Danto, only the meaning ascribed by the artworld counts. As the hypothetical critic dispenses meaning by fiat, her authority is immense, maybe even

grabbed one and bit it. It tasted stale.” Qtd. in Daniel Birnbaum, *The Art of Destruction*, FRIEZE, no. 35, June-Aug, 1997.

⁷⁷ DANTO, *supra* note 21 at 125. As if denying his own efforts, Danto later declared, “You can’t say something’s art or not art anymore. That’s all finished.” Qtd. in Amei Wallach, *Is It Art? And Who Says So?* N.Y. TIMES, Oct. 12, 1997, at B36.

⁷⁸ Danto, *supra* note 67, at 142.

⁷⁹ *Id.*

⁸⁰ E.g., Matthew W. Hughey, *Cinematic Racism: White Redemption and Black Stereotypes in “Magical Negro” Films*, 56 SOC. PROBS. 543 (2009).

⁸¹ E.g., KENNETH MACKINNON, MISOGYNY IN THE MOVIES: THE DE PALMA QUESTION (1990).

greater than the artist's. In one sense, it is folly to dispute Danto's definition, for a definition is merely a record of one's determination to use a word in a certain way. Danto, from this perspective, is less concerned with the nature of art or art as an activity than with the appropriate labeling of art. To which one might reply (with Humpty Dumpty): "The question is, which is to be master – that's all."⁸² Danto, in short, is free to define art as green cheese if he so chooses.

However, we are also entitled to inquire as to the consequences of his definition, for the devil is in the details. Danto describes himself as an "essentialist [who seeks] to find the definition of art everywhere and always true."⁸³ Suppose, as often happens in the face of major innovations the artworld is divided, for example, as it was at the birth of impressionism⁸⁴ or cubism.⁸⁵ In the absence of consensus, how to discover whether a work qualifies as art? Does this disagreement suggest that some of the critics' designations may be mistaken? Can one member of the artworld, say, a gallery owner, act on behalf of the artworld as a whole, without bothering about winning their consent? Or is this literally, by definition, impossible? In the end, if the designation is simply a question of whether the "work . . . suit[s] the critic's taste,"⁸⁶ would evolving taste, then, mean that a work might be art at one point, not art at another, and art again at a third? Should we ignore the views of earlier generations in a paroxysm of presentism? Suppose we doubt whether in days gone by there were *any* people we might now recognize as critics operating in an art tradition, for example, in the time of cave paintings?⁸⁷ Danto refers to these works as a form of "past art," and seems impressed that the "painters had their predecessors as models,"⁸⁸ but perhaps, there then existed no concept of art as we know it, so the cave painters themselves did not consider themselves artists or their work art.⁸⁹ Which also suggests the absence of an artworld. Would these

⁸² LEWIS CARROLL, *ALICE IN WONDERLAND AND THROUGH THE LOOKING-GLASS* 247 (1924) (1865).

⁸³ Danto, *supra* note 67, at 128. Sometimes he departs from this position, indicating that the intention of the artist and not the work itself is key in determining whether it qualifies as art.

⁸⁴ See, e.g., Emile Cardon, *Avant le Salon L'Exposition des Révoltés*, LA PRESSE, 2-3 Apr. 29, 1874; SUE ROE, *THE PRIVATE LIVES OF THE IMPRESSIONISTS* 129 (2007). A prominent critic wrote a scathing review that may have coined the term "impressionism." Louis Leroy, *Les Expositions des Impressionnistes*, LE CHARIVARI, Apr. 25, 1874.

⁸⁵ See, e.g., Julian Street, *Why I Became a Cubist*, EVERYBODY'S MAGAZINE, 28 (June 1913); *Medical Science's Protest against New "Art."*, WASH. TIMES, Oct. 9, 192A prominent critic wrote a hostile review that may have coined the term "cubism." Louis Vauxcelles, *Le Salon des Independants*, GIL BLAS, Mar. 25, 1909.

⁸⁶ JOSEPH KOSUTH, *ART AFTER PHILOSOPHY AND AFTER* 17 (Gabriele Guercio ed., 1991).

⁸⁷ Stephen Davies, *Defining Art and Artworlds*, 73 J. AESTHETICS & ART CRITICISM 375 (2015).

⁸⁸ ARTHUR C. DANTO, *AFTER THE END OF ART: CONTEMPORARY ART AND THE PALE OF HISTORY* 62 (1997).

⁸⁹ A distinguished German scholar believed that "prior to the Renaissance, no Western theory of the image had been resolved." HANS BELTING, *LIKENESS AND PRESENCE: A HISTORY OF THE IMAGE BEFORE THE ERA OF ART* 351 (Edmund Jephcott trans., 1994). Another distinguished German scholar maintained that European intellectuals deployed no concept of art until the eighteenth century. Paul Oskar Kristeller, *The Modern System of the Arts: A Study in the History of Aesthetics Part I*, 12 J. HIST. OF IDEAS 496 (1951). Elsewhere, he concedes that "the various arts are certainly as old as human civilization." Paul Oskar Kristeller, *The Modern System of the Arts: A Study in the History of Aesthetics*

considerations deny these paintings the label of art or would certifying by today's critics retrospectively save their status? Danto understands the conundrum. "The eye is not historical," he likes to say, "but we are."⁹⁰ But how to incorporate this insight into his theory? His answer: "there is a kind of transhistorical essence in art, everywhere and always the same, but it only discloses itself through history."⁹¹ But how could we even begin to show this is true?

In the absence of a formal certifying body, does the artworld certify itself? How to establish the critic's bona fides? Must the critic be a real person or may it be a hypothesized ideal – and if a person, can the critic be the artist herself, expert, knowledgeable but not exactly disinterested? Danto asks us to rely on an appeal to authority, a standard logical fallacy, except that he uses the authority not to establish the truth of a proposition, but rather the utility of a definition. All this matters because without the critic – as much as without the artist – art would be impossible. Does this make sense?

More fundamentally, why ensconce critics as gatekeepers? With the Museum of Modern Art's huge posthumous exhibit, *Andy Warhol: A Retrospective* (1989), Warhol was designated the most important and influential artist of the twentieth century. Was he the most profound? The most innovative? The most impactful? The power of the museum's designation required nothing so precise. Then, why require gatekeepers at all? We understand that we need physicians as gatekeepers. If we were free to purchase any medicine we chose, the results might be horrific. Similarly, we understand why we are not permitted to drive cars without driving licenses certifying some minimum level of competency. In these cases, society acting through an institutional intermediary and following formal procedures reaches decisions grounded in a consensus on safety. But why do we need experts on their own authority to define art for us? If we fail to grasp the art in Marcel Duchamp's famous "Fountain" – in reality, simply a readymade urinal with the words "R. Mutt 1917" scrawled on the base – what harm have we caused by our naïve philistinism?⁹²

Why, then, do we need Danto to police the boundaries of art?

The answer, of course, is financial. As an economist surveying the art market put it, "You are nobody in contemporary art until somebody brands you. Or until you brand yourself."⁹³ Collectors, often limited in artistic expertise and thus unwilling to trust their own instincts, require some externally driven ratings to ensure that they avoid foolish purchasing decisions. An artworld certification, where critics grade artworks and instruct the Great Unwashed, meets that need.⁹⁴

Part II, 13 *J. Hist. of Ideas* 17, at 45 (1952). Cf., James I. Porter, *Is Art Modern? Kristeller's "Modern Systems of Art" Reconsidered*, 49 *Br. J. Aesthetics* 1 (2009).

⁹⁰ Qtd in WHITNEY DAVIS, *A GENERAL THEORY OF VISUAL CULTURE* 11 (2017).

⁹¹ Danto, *supra* note 65, at 28.

⁹² The "Fountain" episode is discussed in CALVIN TOMKINS, *DUCHAMP: A BIOGRAPHY* (1996). Duchamp insisted that the urinal not be viewed aesthetically, as "I thought to discourage aesthetics . . . I threw the . . . urinal in their faces as a challenge." Qtd. in HANS RICHTER, *DADA: ART AND THE ANTI-ART 207-08* (1966).

⁹³ DON THOMPSON, *THE \$12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART* 84 (2008). Thompson's artworld, however, sees the critic and curator as losing influence vis a vis the collector, dealer, and auction house.

⁹⁴ On the other hand, the artworld's seal of approval may enable sellers to take advantage of gullible purchasers, as in Tyco's CEO, Dennis Kozlowski, famously overpaying for

But how, by the way, do critics make up their minds? What criteria do *they* apply? In the end, are we left with an unaccompanied demand simply to trust today's critics? As Danto was a critic, there is an unmistakable element of self-dealing here. Art is defined by the artworld, which is defined by its art. Indeed, the reader cannot avoid wondering whether there is any point to Danto's exercise other than elevating the status and power of the critic, including, not coincidentally, himself. Would it be preferable simply to consider art undefinable?⁹⁵ Arguably, this might actually encourage innovation and risk taking by eliminating the role of the self-appointed, judgmental expert.⁹⁶ Why not leave the question open and unaddressed?

In support of this, a casual reader may take for granted that vision – including the critic's vision – is essentially a passive phenomenon: we open our eyes and see the object before us. Yet often, of course, our eyes are actively searching for something, and what we “see” may be a function of our expectations or memories, which may induce us to misperceive certain objects or not notice them at all. Show a painting of an airplane to a citizen of ancient Athens and she may not know what to make of it; to us, it is so obvious that we do not pause to decipher its meaning. We are simultaneously aware that we are viewing an airplane and a painting, what Wollheim calls “twofoldness.”⁹⁷ Thus, in a rough and imprecise way, we might say that while we look at an object, it looks back at us.⁹⁸ All this complicates the critic's task, generating disagreement and confusion.

George Dickie elaborated on Danto's notion of the artworld. Both philosophers are essentialists, who believe, as Clive Bell put it, that “The forms of art are inexhaustible; but all lead to the same road of aesthetic emotion to the same world

weaker works by famous painters. Paul Tharp, *Art Pros: Disgraced Kozlowski Was a Sucker*, N.Y. POST, June 12, 2002; Jay Palmer, *Show Me the Monet*, BARRON'S, Nov. 18, 2002.

⁹⁵ Cook maintains that the open character of art makes it impossible to specify which objects merit the label. Roy T. Cook, *Art, Open-Endedness, and Infinite Extensibility*, in ART AND ABSTRACT OBJECTS 69 (Mag Uidhir ed., 2013). Weitz believes that while works of art share a familial relationship, the unpredictable nature of the evolution of art makes it impossible to establish a fixed set of necessary and sufficient conditions that could adequately define art, as the concept is open and emendable and thus can evolve in unforeseen ways. Morris Weitz, *The Role of Theory in Aesthetics*, 15 J. AESTHETICS & ART CRITICISM 27 (1956). Weitz follows Wittgenstein's notion of family resemblance: something may resemble something that is called art, so art grows to encompass the new thing; hence, the concept of art knows no fixed limits. There are “no common properties – only strands of similarities.” Ludwig Wittgenstein *et al.*, *Philosophical Investigations* 67 (G.E.M. Anscombe et al. trans., 4th ed., 2009). An empirical study concluded that most “people have an open concept of art.” Ellen Winner, *How Art Works: A Conversation between Philosophy and Psychology*, 163 PROC. AM. PHIL. SOC. 136, 141 (2019). See also William E. Kennick, *Does Traditional Aesthetics Rest on a Mistake?* 67 MIND 317 (1958). E.H. Gombrich declared, apparently without irony, in THE STORY OF ART 15 (1950) that “There really is no such thing as art. There are only artists.”

⁹⁶ *But cf.*, Maurice Mandelbaum, *Family Resemblances and Generalization Concerning the Arts*, 2 AM. PHIL. Q. 219, 226 (1965).

⁹⁷ RICHARD WOLLHEIM, ART AND ITS OBJECTS 224 (2d ed., 1980). Similarly, Rene Magritte's famous painting, “Ceci n'est pas une pipe,” reminds the viewer that she is viewing a painting of a pipe, not a pipe.

⁹⁸ JAMES ELKINS, THE OBJECT STARES BACK: ON THE NATURE OF SEEING (1996).

of aesthetic ecstasy.”⁹⁹ For Dickie, “a work of art is art because of the position it occupies within a cultural practice;”¹⁰⁰ more specifically, it is “an artifact of a kind created to be presented to an artworld public.”¹⁰¹ A work of art, then, is “a status which is achieved as the result of creating an artifact within or against the background of the artworld,”¹⁰² that is, critics, art historians, museum curators, teachers, dealers, collectors, government and private funders. The artworld, a “cultural construction”¹⁰³ constituted as formal and informal institutions, engages in conversations, reading, and thinking, and from this develops rules or conventions that determine whether to legitimize or designate certain things as art. Literally, anything is eligible. Hence, the label of Dickie’s approach as the institutional theory of art. Of course, in ordinary speech, “institution” rarely assumes so amorphous a character, but normally has well defined structures and functions, goals and histories.

Dickie admits that some works that are so designated by his institutions are mediocre or worse,¹⁰⁴ but he demands that the focus not only be on the works but on the designator. Here, he insists that the work must be an artifact, that is, an object presented to the artworld and made by a person, though he would also include readymades (like Duchamp’s shovel, “In Advance of the Broken Arm”) and found pieces (like driftwood art), for it is persons who made them into artifacts.¹⁰⁵ Because “an artist always creates for a *public* of some sort,” Dickie maintains that there “must [be] a role for a *public* to whom art is presented.”¹⁰⁶ By “public,” echoing Clive Bell, he means the artworld public, which “requires knowledge and understanding similar in many respects to that required of an artist.”¹⁰⁷

Like Danto, however, Dickie does not attempt to spell out what criteria the artworld would or should employ in determining whether an artifact qualifies as art. Instead, his definition, by altering nouns, could be applied to anything; for example, a football match is an artifact of a kind created to be presented to the football public.¹⁰⁸ He also ignores artists who, for whatever reason, choose not to interact with the artworld. Finally, he, too, fails to persuade us that the exercise is worth doing. What he does do is offer us art as a sociologist might do, that is, concerned not with the nature of the work but simply with how self-selected elites view it.¹⁰⁹

Joseph Kosuth, a pioneering and highly regarded conceptual artist, rebelled against the tradition of art-and-the-passive-spectator, dismissing the art that came

⁹⁹ BELL, *supra* note 36, at 16. They would agree on the single road, but not on Bell’s destination.

¹⁰⁰ GEORGE DICKIE, *THE ART CIRCLE: A THEORY OF ART* 52 (1984).

¹⁰¹ *Id.*, at 60. *Cf.*, George Dickie, *Defining Art*, 6 *AM. PHIL. Q.* 253, 254 (1969).

¹⁰² George Dickie, *The New Institutional Theory of Art*, *Proc. of the 8th Wittgenstein Sympos.* 57, 60 (1983).

¹⁰³ GEORGE DICKIE, *ART AND VALUE* 60 (2001).

¹⁰⁴ *Id.*, at 94.

¹⁰⁵ DICKIE, *supra* note 100, at 45.

¹⁰⁶ Dickie, *supra* note 102, at 61.

¹⁰⁷ *Id.*

¹⁰⁸ *Cf.*, Carroll, *supra* note 39, at 12-13.

¹⁰⁹ Perhaps the point is that the elite’s judgment permits the works to take on the social function of art. NOEL CARROLL, *THE PHILOSOPHY OF ART: A CONTEMPORARY INTRODUCTION* 248 (1999).

before him as “little more than historical curiosities.”¹¹⁰ As the purpose of art is to convey meaning and actively engage the viewer, images merely get in the way and should be done away with. Instead, installations of objects can provoke us to think deeply about social (racism, poverty) or personal (loneliness, identity) issues. This involves a struggle against critics, who sought to impose their taste and dominate artists. “A work of art,” he maintains, “is a kind of proposition presented within the context of art as a comment on art.”¹¹¹ Each work of art, then, he sees as an effort by the artist to define art, in short, a function of the artist’s intent. Kosuth is far more radical than Danto or Dickie, and yet he shares their reluctance to inform us as to precisely how those in possession of the label “art” propose to justify using it.

At about the same time that Danto and his critics were meditating on the nature of the artworld, a distinguished sociologist, Howard Becker, was approaching the topic from a different perspective. It is sometimes assumed that art arrives as a consequence of the artist’s “unwavering commitment to his personal vision,”¹¹² but to Becker this focus on individual genius is mere romantic jabbering. Like Danto, Becker downplays the role of the artist, but instead of elevating the critic, he emphasizes that art works “are not the products of individual makers,” but instead “like all human activity, involve the joint activity of a number, often a large number, of people.”¹¹³ Here, Becker refers not only to the “extensive division of labor” and “elaborate cooperation”¹¹⁴ among those who make and sell the supplies, operate the galleries, discuss the art in the media, and so forth. He also has in mind that artists “do not decide things afresh. Instead, they rely on earlier agreements now become customary, agreements that have become part of the conventional way of doing things in that art.”¹¹⁵ These conventions, widely taken for granted, cover a range of factors from the materials used to the assumptions of the viewers, and shape aesthetic judgments, as well as matters of production, distribution, marketing, and consumption.

And yet, conventions change; indeed, Becker concedes that they “change more or less continually,” and in this sense, are only stable “for a while.”¹¹⁶ Radical change, however, raises different questions from the normal process of gradual evolution. It constitutes an assault on the aesthetic beliefs we accept as “natural, proper, and moral;” it also attacks the interests of an art world “invested in the status quo.”¹¹⁷ Because making art involves the efforts of many people, “Revolutionary changes succeed when their originators mobilize some or all of the relevant art world to cooperate in the new activities their vision of the medium requires.”¹¹⁸ Much of the art world must relinquish the grip of the familiar, welcome the new, and market the change to an audience sophisticated and unsophisticated. Yet against the overwhelming weight of the art world, Becker isolates innovation in the individual artist. “Change takes place . . . because artists whose work does not fit and who thus

¹¹⁰ KOSUTH, *supra* note 86, at 19.

¹¹¹ *Id.* at 20-21.

¹¹² SEYMOUR SLIVE, 2 FRANS HALS 147 (1970).

¹¹³ HOWARD S. BECKER, ART WORLDS 35, 1 (1982).

¹¹⁴ *Id.* at 13, 28.

¹¹⁵ *Id.* at 29.

¹¹⁶ *Id.* at 301, 307.

¹¹⁷ *Id.* at 305, 306.

¹¹⁸ *Id.* at 308.

stand outside the existing systems attempt to start new ones and because established artists exploit their attractiveness to the existing system to force it to handle work they do which does not fit.”¹¹⁹ Such an innovator was Warhol.

Ironically, though Becker found that the “artworld” Dickie and Danto refer to does not have much meat on its bones,¹²⁰ he agrees that “aesthetic value arises from the consensus of the participants in the art world” and that “art world officials have the power to legitimate works of art.”¹²¹ Thus, “however their position is justified, some people are commonly seen by many or most interested parties as more entitled to speak on behalf of the art world than others; the entitlement stems from their being recognized by the other participants in the cooperative activities through which that world’s works are produced and consumed as the people entitled to do that.”¹²² What gives this power its special importance is its connections to the resources available.¹²³ Works that gain the artworld’s approval become valuable to collectors and to those in charge of grants and awards, as well as conferring considerable pride in achievement among the artists concerned.

In sum, an examination of some prominent excursions into the question, what is art, leaves us (unsurprisingly) with a very unsatisfactory product. It is what some self-selected experts say that it is.

Complicating matters further is the fuzzy distinction between art and craft. They are related, but different, we understand, with art somehow being more valuable and significant. The most obvious difference is that craft objects possess a practical function, where art objects do not.¹²⁴ In the famous words of Oscar Wilde, “All art is quite useless.”¹²⁵ Hence, a painting represents art and a quilt represents craft. But suppose we do not use the quilt on a bed, but, like a painting, display it on a wall as an object of aesthetic contemplation? Or suppose we use a painting as a desk? What of the Euphronios Krater, a huge ancient Greek urn used for mixing wine and water, of which a former director of the Metropolitan Museum of Art said, “this may be the single greatest work of art . . . I will ever collect.”¹²⁶ Have these objects lost their functional character because the creator or current owner renounces it? And why posit that a work of art that stimulates or inspires lacks a practical function? If it leads us to examine and reconsider, say, war, nature, color, shape, why (as Kosuth might demand) dismiss this as useless? What to make of Duchamp’s shovel, which is as utilitarian as an object could possibly be, yet is universally regarded as art? Or the tombs in Westminster Abbey, aesthetic on the outside and utilitarian on the

¹¹⁹ *Id.* at 136.

¹²⁰ *Id.* at 149.

¹²¹ *Id.* at 134, 163.

¹²² *Id.* at 151.

¹²³ *Id.* at 133, 157. Taxpayers also subsidize the arts, chiefly through such tax expenditures as charitable deductions and lower capital gains levies.

¹²⁴ Kant thought art was made “only as play, i.e., an occupation that is agreeable in itself” that requires the soul to be put to work. Craft, on the other hand, depends on industry and learning, and is made for money. IMMANUEL KANT, *THE CRITIQUE OF THE POWER OF JUDGMENT* 183 (Paul Guyer & Eric Matthes trans., Guyer ed., 2000) (1790).

¹²⁵ Oscar Wilde, *A Preface to The Picture of Dorian Gray*, 49 *FORTNIGHTLY REV.* 291 (1891). Presumably, Wilde meant that art is superior to mundane practicality.

¹²⁶ Thomas Hoving, *Super Art Gems of New York City*, ARTNET (June 27, 2001), <http://www.artnet.com/Magazine/features/hoving/hoving7-2-01.asp>.

inside? Did today's art begin as craft?¹²⁷ As "art invades craft,"¹²⁸ and craftspeople naturally aspire to the status of artists, the confusion is compounded.

Finally, there is the question as to whether there can be art without artists. Kant observed that "though we like to call the product that bees make (the regularly constructed honeycombs) a work of art . . . we recall that their labor is not based on any rational deliberation on their part," and is, therefore, not art.¹²⁹ Similarly, Dutton argued that as art "needs an intention to create something you are going to want to look at after you are finished . . . animals . . . do not create art."¹³⁰ Empirical research indicates that for most people, intentionality is the most important factor in their determination as to whether an object qualifies as a work of art.¹³¹ On the other hand, Dickie thought it irrelevant.¹³² Kamber conducted an online survey, asking professional artists, art buffs, and ordinary people whether they considered a number of different objects (paintings, photographs, poems) works of art. He found that thirty-six percent of art professionals thought a painting by an elephant a work of art and ten percent regarded a cloud as a work of art.¹³³

Of more pressing interest, artists and computer experts have developed artificial intelligence (AI) innovations, really sets of algorithms or instructions intended to mimic human intelligence, sometimes by "learning" from Internet content to generate new work. Indeed, computer generated art was produced as early as 1973.¹³⁴ Today, Generative Adversarial Networks (GANs) can generate visual content,¹³⁵ AICAN can produce images that may appear indistinguishable

¹²⁷ MICHAEL BAXANDALL, *PAINTING AND EXPERIENCE IN FIFTEENTH CENTURY ITALY* (1972).

¹²⁸ Howard S. Becker, *Arts and Crafts*, 83 AM. J. SOCIO. 862, 867-76 (1978).

¹²⁹ KANT, *supra* note 124, at 182.

¹³⁰ Dutton, *supra* note 53, at 7, 9. See also CHRISTY MAG UIDHIR, *ART AND ART-ATTEMPTS* 22-25 (2013).

¹³¹ Elze Sigute Mikalonyte & Markus Kneer, *The Folk Concept of Art* 12-13 (Jan. 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4322866; Jean-Luc Jucker *et al.*, "I Just Don't Get It": *Perceived Artists' Intentions Affect Art Evaluations*, 32 EMPIRICAL STUD. OF THE ARTS 149 (2014); George E. Newman & Paul Bloom, *Art and Authenticity: The Importance of Originals in Judgments of Value*, 141 J. EXPERIMENTAL PSYCH. GEN. 558 (2012).

¹³² George Dickie, *Intentions: Conversations and Art*, 46 BR. J. AESTHETICS 70 (2006).

¹³³ Richard Kamber, *Experimental Philosophy of Art*, 69 J. AESTHETICS & ART CRIT. 197, 202 (2011).

¹³⁴ Ahmed Elgammal, *AI Is Blurring the Definition of Artist: Advanced Algorithms Are Using Machine Learning to Create Art Autonomously*, 107 AM. SCIENTIST 18 (2019). However, when viewers are told that the work is AI generated, they tend to perceive it as less creative and less likely to produce an emotional response than if they thought it was human created. Kobe Millet *et al.*, *Defending Humankind: Anthropocentric Bias in the Appreciation of AI Art*, 143 COMPUTS. IN HUM. BEHAV. 107707 (2023). Indeed, people appear reluctant to term AI creators artists. Elze Mikalonyte & Markus Kneer, *Can Artificial Intelligence Make Art? Folk Intuitions as to Whether AI-Driven Robots Can Be Viewed as Artists and Produce Art*, 11 ACM TRANSACTIONS ON HUM.-ROBOT INTERACTIONS 1 (2022).

¹³⁵ Ian Goodfellow *et al.*, *Generative Adversarial Nets*, 27 ADVANCES IN NEURAL INFO. PROCESSING SYS. 2672 (2014); Lei Wang *et al.*, *A State -of-the-Art Review on Image Synthesis with Generative Adversarial Networks*, 8 IEEE ACCESS 63514 (2020).

from paintings,¹³⁶ style transfer can create new art in the style of old masters,¹³⁷ and AI art has been compared to photography.¹³⁸ Advocates contend that when AI uses existing content, it is merely learning from available material as a means of producing its own material, in short, acting the way human artists act. In this light, it has been suggested that the algorithms be considered more a medium than a tool,¹³⁹ and so persons using AI techniques are often called artists. Also, if we view the First Amendment from the perspective of the audience, we should acknowledge its right to view all kinds of art, including art generated by AI.

On the other hand, some artists are quite hostile to AI, viewing it as a tool of high-tech plagiarism and sometimes fearing that massive and cheap AI will make it hard for human artists to successfully compete. Of course, this is a self-interested economic argument, but to the extent that it discourages human artists, it might possibly have a limited constitutional purchase. As major technology companies race to develop generative AI, it might well transform both art and artworld in ways that we cannot foresee. How would Danto, Dickie, and Kosuth greet this brave new world?

IV. THE COURTS SPEAK

Understandably, courts are not eager to venture into the Definition of Art swamp and might be tempted to echo Justice Stewart's famous observation about obscenity: they know it when they see it.¹⁴⁰ Except presumably courts understand (or ought to understand) that they do *not* know art when they see it. Perhaps, a century ago, they might have relied on subjective intuition guided by memories of the Mona Lisa and Washington Crossing the Delaware, but those days are gone, never to return. Alternatively, courts might be bullied by postmodernists into openly embracing the views of Danto, Dickie, or Kosuth, formally (or informally) subcontracting the question to a self-selected elite with no constitutional expertise or authority.

Defining art might be dismissed as yet another pointless academic exercise, were it not for the fact that courts have extended First Amendment protection to art. Having done that, one might expect that they might seriously grapple with the key term. But one would be mistaken.

Consider some examples of what courts have done or not done.

Close v. Lederle (1970) concerned Chuck Close, one of the most highly praised artists in America, who was asked to exhibit his paintings at the University of Massachusetts. After a few days, administrators had the paintings, sexually provocative male nudes, removed. Close responded with a lawsuit claiming that art is fully protected by the First Amendment, with the removal violating his free

¹³⁶ Marian Mazzone & Ahmed Elgammal, *Art, Creativity, and the Potential of Artificial Intelligence*, 8 ARTS 26 (2019).

¹³⁷ Christine S. Pitt, Anjali S. Bal & Kirk Plangger, *New Approaches to Psychographic Consumer Segmentation: Exploring Fine Art Collectors Using Artificial Intelligence*, 54 EUR. J. MKTG. 305 (2020); *The Next Rembrandt: Blurring the Lines between Art Technology and Emotion*, MICROSOFT NEWS (Apr. 13, 2016).

¹³⁸ Aaron Hertzmann, *Can Computers Create Art?* 7 ARTS 18 (2018).

¹³⁹ Mazzone & Elgammal, *supra* note 136.

¹⁴⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

speech rights. He sought an injunction forcing the university to display his work for the unexpired period for which it had been scheduled.

The First Circuit in a brief opinion, dismissed Close's contention for ignoring that the exhibit imposed "inappropriate"¹⁴¹ images upon "a captive audience."¹⁴² As "there is no suggestion . . . that plaintiff's art was seeking to express political or social thought," the court concluded that their "constitutional interest [was] minimal."¹⁴³ Accordingly, "this is a case that should never have been brought."¹⁴⁴ Close's First Amendment claims – which he believed expressed obvious political and social thought – were swept aside like crumbs off a table.

Soon after, the Supreme Court adopted a different stance in the famous case of *Miller v. California* (1973), which set down criteria for determining obscenity and explicitly exempted work of "artistic . . . value" from suppression.¹⁴⁵ However, Justice Brennan did no more than list artistic value along with three other categories, none of which received any elucidation whatever. In the same paragraph, Brennan observed that "to equate the free and robust exchange of political ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom."¹⁴⁶ With this, Brennan struck a pair of themes that would resonate in many art related First Amendment cases to come: that the desire to profit is somehow incompatible with First Amendment values,¹⁴⁷ and that low aesthetic quality bars First Amendment protection.¹⁴⁸

At the same time, in *Kaplan v. California* (1973), a case involving a bookstore selling explicit sexual material in violation of an obscenity law, the Supreme Court intimated that pictures may be entitled to less First Amendment protection than the printed word. As Chief Justice Burger put it, echoing Brennan's remark on quality,

Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. A book seems to have a different and preferred position in our hierarchy of values, and so it should be.¹⁴⁹

Thus, a picture is no longer worth a thousand words. As the holding was in the context of obscenity, virtually a dead letter today, it is not clear that the finding retains much precedential value. However, a California Court of Appeals' ruling the

¹⁴¹ Close v. Lederle, 424 F. 2d. 988, 990 (1st Cir. 1970).

¹⁴² *Id.* at 991.

¹⁴³ *Id.* at 990.

¹⁴⁴ *Id.* at 991.

¹⁴⁵ *Miller v. Calif.*, 413 U.S. 15, 34 (1973).

¹⁴⁶ *Id.*

¹⁴⁷ In holding that obscene materials were not protected by the First Amendment, Brennan also held the door open to efforts to suppress a wide range of erotic expression, though changes in public attitudes have completely robbed this of any practical significance.

¹⁴⁸ *Cf.*, Randall Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L. J. 275, 277 (1996).

¹⁴⁹ *Kaplan v. Calif.*, 413 U.S. 115, 119 (1973).

following year concerning a vendor of paintings reached the same conclusion.¹⁵⁰

Claudio v. United States (1993) concerned a large painting that the General Services Administration granted a license to be displayed in the lobby of a federal courthouse and post office building. Upon viewing the painting at its unveiling, the agency decided to remove it, on the ground that its graphic and bloody depiction of a coat hanger-induced abortion and a dead fetus constituted political expression that was not allowed in federal property. Claudio contested the removal, maintaining that the First Amendment gave him the right to exhibit politically controversial work in a public forum. The removal, he charged, amounted to unconstitutional content and viewpoint-based discrimination.

The North Carolina district court concluded, astonishingly, that Claudio failed to establish that the government was “motivated by a desire to suppress viewpoint [because] the painting is ambiguous in its position on abortion and likely was designed that way.”¹⁵¹

The court also repeatedly expressed contempt for the painting, calling it “art”¹⁵² and describing it as “vulgar, shocking and tasteless,”¹⁵³ “vulgar and inappropriate,”¹⁵⁴ and lacking “taste, “decorum,” “sensitivity,” or “respect.”¹⁵⁵ It is not clear that the judge would designate the painting as a work of art or entertain the possibility that vulgar, tasteless art was not a contradiction in terms,¹⁵⁶ but in any event, defining art formed no part of his decision.

Brooklyn Institute of Arts & Sciences v. Giuliani (1999) concerned an artwork called “The Holy Virgin Mary,” constructed of elephant dung and other material with photographs of buttocks and female genitalia in the background. New York’s mayor, Rudolph Giuliani, viewing the work as desecrating religion and therefore offensive, threatened to cancel the museum’s lease on its building and withhold its monthly subsidy from the city of nearly a half million dollars. The museum sought declaratory and injunctive relief to prevent the city from taking this action.

The district court found that the city’s move would cause irreparable damage to the museum, and that the mayor’s effort “to coerce the museum to relinquish its First Amendment rights” did not amount to “the mere assertion of an incidental infringement.”¹⁵⁷ In the course of deciding for the museum on grounds of viewpoint discrimination, the court noted that the city conceded that art and the ideas it expresses are protected by the First Amendment.¹⁵⁸ Again, art was left undefined.

Bery v. New York (1996) turned on a municipal ordinance of general application that limited the number of New York City sidewalk vendor licenses in the interest of reducing congestion in a densely populated urban area. A number of artists who sold their work on sidewalks and could not obtain licenses maintained that art

¹⁵⁰ S.F. St. Artists Guild v. Scott, 112 Cal. Rptr. 502, 505 (Cal. Ct. App. 1974).

¹⁵¹ Claudio v. United States, 836 F. Supp. 1219, 1230 (E.D.N.C. 1993).

¹⁵² *Id.*, at 1234.

¹⁵³ *Id.*, at 1235.

¹⁵⁴ *Id.*, at 1236.

¹⁵⁵ *Id.*, at 1234.

¹⁵⁶ In a survey of art professionals, art buffs, and ordinary folk, Kamber found that in each category clear majorities were willing to term aesthetically weak objects as art. Dutton, *supra* note 130, at 198-99.

¹⁵⁷ Brook. Inst. of Arts v. N.Y., 64 F. Supp. 2d 184 (E.D.N.Y.1999).

¹⁵⁸ *Id.* at 199.

receives absolute protection from the First Amendment and sought a preliminary injunction prohibiting enforcement of the ordinance against them.

The Second Circuit noted that “Visual art is as wide ranging in its depiction of ideas, concepts, and emotions” as written material, so that paintings, photographs, sculptures, and prints “always communicate some idea or concept” to the viewer. Thus, visual art, “a primitive but effective way of communicating ideas . . . is similarly entitled to full First Amendment protection.”¹⁵⁹ Whether other types of art merited protection would be left to a case by case examination, depending upon the expressive quality of the item.

The city, however, viewed “visual art as mere ‘merchandise’ lacking in communicative concepts or ideas,”¹⁶⁰ distinguishing between art and selling art, and noting that it permitted artists to display their art but simply not to sell it. The court observed that “without the money, the plaintiffs would not have engaged in the protected expressive activity.”¹⁶¹ The court also noted that “street marketing is in fact a part of the message,” as the vendors “believe that art should be available to the public.”¹⁶² Applying settled time, place, and manner criteria, the court found that the licensing system was not narrowly tailored and did not leave the artists ample alternative channels that would justify barring an entire category of expression. The court’s opinion is notable for accepting the commercial aspect of art, alluding to differences between art and craft, and addressing the nature of visual art at some length.¹⁶³ And yet, even here, there was no real attempt to define art.

Mastrovincenzo v. New York (2006) saw the Second Circuit revisiting *Bery*. This case involved a vendor, who sold items outside the four protected categories listed in *Bery*, specifically, hand designed and painted clothing. The city required that vendors be licensed, but he was unable to obtain a license because the city had limited the number and there were no vacancies. He then violated the law by selling the clothing without a license, arguing that they were works of art, which were therefore protected by the First Amendment.

The Second Circuit retained *Bery*’s four categories, but added that the key determination was whether the “dominant purpose” of the work was expressive or utilitarian,¹⁶⁴ that is, whether the vendors “are genuinely and primarily engaged in artistic self-expression or whether the sale of such goods is instead chiefly a commercial exercise.”¹⁶⁵ Should the focus, then, not be on the work, but on its

¹⁵⁹ *Bery v. N.Y.*, 97 F. 3d 689, 695 (2nd Cir.1996).

¹⁶⁰ *Id.* at 695.

¹⁶¹ *Id.* at 696.

¹⁶² *Id.*

¹⁶³ In requiring art vendors but not print vendors to have licenses, the ordinance also violated the Fourteenth Amendment’s equal protection clause. *Id.* at 699.

¹⁶⁴ *Mastrovincenzo v. N.Y.*, 435 F. 3d 78, 91 (2^d Cir. 2006).

¹⁶⁵ *Id.* In *State v. Chepilko* (2009), a New Jersey appellate court upheld the conviction of a sidewalk photographer, who sold photographs of pedestrians, finding “no basis for concluding that defendant’s simple snapshots . . . served predominantly expressive purposes.” *State v. Chepilko*, 405 N.J. Super. 446, 463 (App. Div. 2009), *pet. denied*, 201 N.J. 156 (2010). (Presumably, had the street photographs instead been sold at galleries – like the work of such renowned street photographers as Gary Winograd, Lee Friedlander, and Robert Frank – courts would have reached a different result.) Similarly, in *People v. Saul*, a New York court upheld the conviction of a sidewalk vendor selling playing cards with photographic images of war heroes and political figures, finding that the cards

dominant purpose? Must art flee from commerce as a toxic inferno?

It is understandable that courts would not want vendors to call themselves artists in order to evade regulation, as this would lead to a proliferation of vendors, exacerbating congestion. But the artworld also adds to the problem, for it is frequently painfully squeamish about commerce, as if money were somehow too *déclassé* to mention, when actually it might well be the point of everything. Thus, Bosker observes that galleries (not art stores) place a work (not sell it) and purchasers acquire it (not buy it).¹⁶⁶

Yet requiring artists, perhaps alone among all occupations, to downplay the goal of earning a living is passing strange. Consider Warhol, perhaps the most famous artist of the past half century. “Being good in business is the most fascinating kind of art,” he said. “Making money is art and a good business is the best art.”¹⁶⁷ “The new art,” he remarked, “is really a business.”¹⁶⁸ This did not mean that he was less interested in artistic quality in his commercial ventures. However, in place of handmade art, Warhol favored copies produced at his famous Factory. Indeed, an editor at Warhol’s magazine, *Interview*, said of him, “Of everything Andy produced, the Factory was one of his most important works of art.”¹⁶⁹

The court in *Mastrovincenzo* ruled that the clothing was mainly expressive, and thus protected. The court applied the time, place, and manner intermediate scrutiny standard, and found a significant government interest in reducing congestion, and saw the law as narrowly tailored with ample alternative means for the artists to express themselves, for example, giving the clothing away or selling it through licensed vendors. Thus, the vendors’ plea failed.

The great advantage of the court’s expressive/utilitarian dichotomy was said to be its workability: “we live in the real world with law enforcement decisions being made by police on the beat.”¹⁷⁰ Was the ruling as workable as advertised? It did not consider that the dominant purpose of an item may vary from buyer to buyer, seller to seller, and even from item to item. Or that the expressive/utilitarian purposes may be too entangled to separate. The clothing was worn as shirts (utilitarian) but painted with graffiti (expressive); how to decide the dominant purpose without resorting to the arbitrary and the subjective? The court advised balancing the claims but gave no hint as to how this should be pursued,¹⁷¹ itself dismissing it

were more likely bought to be used than to be displayed. *People v. Saul*, 3 Misc. 3d 260, 265 (N.Y. Crim. Ct. 2004). On the other hand, in *People v. Chen Lee*, a street vendor selling coasters featuring pictures of celebrities and famous places was found to have a “dominant” expressive purpose because they were suitable for display and not for use. *People v. Chen Lee*, 19 Misc 3d 791, 795 (N.Y. Crim. Ct. 2006). Thus, selling the photographs was not protected by the First Amendment, but selling the coasters was.

¹⁶⁶ BIANCA BOSKER, *GET THE PICTURE: A MIND-BENDING JOURNEY AMONG THE INSPIRED ARTISTS AND OBSESSIVE ART FIENDS WHO TAUGHT ME HOW TO SEE* (2024).

¹⁶⁷ Artinfo, *The Business Artist: How Andy Warhol Turned a Love of Money into a \$228 Million Art Career*, HUFFPOST (DEC. 16, 2010, 01:10 PM), https://www.huffpost.com/entry/the-business-artist-how-a_b_797728.

¹⁶⁸ Blake Gopnik, *Andy Warhol Offered to Sign Cigarettes, Food, Even Money to Make Money*, ARTFORUM, Apr. 21, 2020.

¹⁶⁹ Glenn O’Brien, qtd in JOHN O’CONNOR & BENJAMIN LIU, *UNSEEN WARHOL* 11 (1996).

¹⁷⁰ *Mastrovincenzo*, 435 F. 3d at 95.

¹⁷¹ *Id.*

as an “ultimately absurd intellectual exercise?”¹⁷² Adding to the confusion, the court declared art “a famously malleable concept the contours of which are best defined not be courts, but in the proverbial eye of the beholder”¹⁷³ – which seems to enshrine inconsistency.

Conceivably, the court could have inquired as to whether the vendors were truly artists. Their formal training presumably would have established their *bona fides*. But this tack would also have been defective, for many esteemed artists were entirely self-taught and a credentialist approach veers close to introducing quality as a First Amendment consideration (credentials providing some assurance of at least minimal skill and commitment). Following this rationale, the underlying assumption would seem to be that good art is protected, bad art is not, and courts applying credentialism can tell the difference. No one would suggest applying this approach to books.

On the matter of ample alternatives, the *Mastrovincenzo* court took a position entirely opposite from *Bery*, indicating that the vendors could add their names to a decades long waiting list, petition the City Council to amend the law, or give the items away.¹⁷⁴

White v. Sparks (2007) involved an itinerant sidewalk artist, who claimed that a city ordinance requiring a license to make and sell art on the street was an unconstitutional content-based limitation on speech that also operated as prior restraint. The city, citing an earlier case, argued that the First Amendment protected only the sale of items with a “religious, political, philosophical, or ideological message.”¹⁷⁵ However, the Ninth Circuit found that the arts were also covered, making it “clear [that the artist’s] painting constitutes expression protected by the First Amendment [as it] expressed the artist’s perspective.”¹⁷⁶ *Contra Mastrovincenzo*, the court added that the paintings did not forfeit this protection by being objects of sale and that the paintings themselves are not commercial speech.¹⁷⁷ Thus, it concluded that “an artist’s sale of his original paintings is entitled to First Amendment protection.”¹⁷⁸

Suppose, however, he was selling another artist’s work or a copy of another artist’s work? Or suppose the copy had been mass produced in a factory? A focus on the work alone might offer it an art designation; a focus on its production might reach a contrary result. The court refused to consider these scenarios.¹⁷⁹ Again a court declined the opportunity to define art.

Kleinman v. San Marcos (2010) involved an owner of chain stores that sold novelty items and gifts. When a new store was opened, customers were invited to pay for the privilege of sledgehammering an old car; the store commissioned painters to paint the wreck; finally, the car was filled with dirt, turned into a cactus planter, and displayed in front of the store. The painters claimed that they had intended to describe American car culture and the tie between gasoline and the

¹⁷² *Id.*

¹⁷³ *Id.* at 94-95.

¹⁷⁴ *Id.* at 95.

¹⁷⁵ *Gaudiya Vaishnava Soc. v. S.F.* 952 F. 2d 1059, 1066 (9th Cir. 1990).

¹⁷⁶ *White v. City of Sparks*, 500 F. 3d 953, 956 (9th Cir. 2007).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 957.

¹⁷⁹ *Id.* at 956 n. 4.

ongoing war in Iraq. A San Marcos ordinance and the Texas Transportation Code banned displaying junked vehicles in public view. A court ordered the store either to remove the car or hide it behind an enclosure, and the store appealed, maintaining that the car was visual art protected by the First Amendment.

The Fifth Circuit, applying a case-by-case approach, held that First Amendment protection “is not so unbounded [and] refers solely to great works of art,”¹⁸⁰ while “this cactus planter, a three-dimensional advertisement for a novelty shop . . . is a utilitarian device . . . and ultimately a ‘junked vehicle.’”¹⁸¹ Its utilitarian “qualities objectively dominate any expressive component,” and so “the public display of the object is conduct subject to reasonable state regulation.”¹⁸² Following the intermediate scrutiny test, the court found that the law furthered an important or substantial governmental interest that was unrelated to suppressing free speech, and that the interference with speech was no greater than was essential in furthering this interest, including offering ample alternative means of expression. Accordingly, the court found the car-planter to be a public nuisance that posed criminal, fire, health, safety, and economic issues, considered the law content neutral and not targeted at speech, and concluded that the planter did not qualify as a work of art because it was “‘promotional’ material” advertising the store.¹⁸³

The court’s opinion, however, could not dislodge a pair of problems. First, it was not obvious that the utilitarian nature of the object negated its artistic content. That is, it is hard to imagine that the lawmakers who banned junked cars had this car, painted by artists and displayed as a work of art, in mind. If a promotional purpose denies a work artistic stature, what of Keith Haring’s drawings on drug use, South Africa, AIDS? The pervasive cross fertilization of art and commerce – advertising campaigns regularly use art and artists regularly use advertising campaigns – suggests that erecting a wall between the two is a fool’s errand. Second, numerous precedents had established that speech cannot be suppressed on grounds of inferior quality. Justice Scalia, for example, had observed in an earlier case, “it is quite impossible to come to an objective assessment of . . . artistic value. . . . Just as there is no use arguing about taste, there is no use litigating about it.”¹⁸⁴ Moreover, when the court declared that hiding the car-planter “behind a fence, indoors, or in a garage enclosure”¹⁸⁵ constituted an ample alternative means of communication, it overlooked the obvious fact that a hidden object could hardly substitute for one openly exhibited. Would permitting a speaker to declaim in a closet constitute an acceptable alternative?

Masterpiece Cakeshop v. Colorado Civil Rights Commission (2018) concerned a same sex couple, who asked Masterpiece to bake them a wedding cake

¹⁸⁰ *Kleinman v. City of San Marcos*, 597 F. 3d 323, 326 (5th Cir. 2010).

¹⁸¹ *Id.* at 326-27.

¹⁸² *Id.* at 327-28.

¹⁸³ *Id.* at 329.

¹⁸⁴ *Pope v. Illinois*, 481 U.S. 497, 504-05 (1987). Similarly, Justice Harlan noted, “it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.” *Cohen v. California*, 403 U.S. 15, 25 (1971). On the other hand, the Court decided that vulgar and profane speech may be banned from radio at time when children would be likely to be listening. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

¹⁸⁵ *Kleinman*, 597 F. 3d, at 329.

and were refused because the baker was religiously opposed to same sex marriage. The Supreme Court found for the baker, citing disparaging comments made by the commission that violated the baker's First Amendment protected religious beliefs.¹⁸⁶

However, much of the oral argument addressed the baker's contention that he was an artist, and, therefore, that compelling him to create a cake for a same sex couple violated his First Amendment rights. The result was repeated colloquies. For example, when the baker's counsel spoke of him as an artist, Justice Ginsburg queried, "Who else then? . . . the person who does floral arranging, owns a floral shop?"¹⁸⁷ Yes, if the flowers are custom designed, the counsel agreed. And the "person who designs the [wedding] invitation?" Yes. And for the jeweler? asked Justice Kagan. "It would depend," the counsel replied, presumably referring to whether the jewelry was custom designed. And a hair stylist "creating a wonderful hairdo?" "Absolutely not." Nor a "makeup artist" because they do not "communicate something." Whereupon Justice Kagan asked that if "a cake can be speech because it involves great skill and artistry . . . how do you draw a line?" Which provided an opportunity for Justice Sotomayor to inquire, "when have we ever given [First Amendment] protection to food?" Dodging the question, the counsel urged that the baker

is painting on a blank canvas. He is creating a painting on that canvas that expresses messages. . . . [W]hen we have someone that is sketching and sculpting and hand designing something, that is creating a temporary sculpture that serves as the centerpiece of what they believe to be a religious wedding celebration, that cake expresses a message.

But later when asked whether an architectural design was entitled to First Amendment protection as art, he said no because "buildings are functionable, not communicative." Which provoked an incredulous Justice Breyer to ask how a design by "Mies or Michelangelo . . . is not protected. . . but this cake baker is?"¹⁸⁸ Later, the Solicitor General entered the fray, maintaining that "the first way to draw that line is you analogize it to something that everyone regards as traditional art and everyone agrees is protected speech." The wedding cake qualifies, he concluded, because it "is essentially synonymous with a traditional sculpture except for the medium used." But it is precisely the medium that the dissenters believed denied the cake its traditional standing. Yet given how art has been radically transformed, why focus on tradition? A key question remaining was whether the cake was "predominantly art or predominantly utilitarian? And here people pay very high prices for these highly sculpted cakes, not because they taste good, but because of their artistic qualities."¹⁸⁹ Turning to the nexus of art and craft, Justice Breyer observed, "An artisan is not quite the same as an artist, but an artisan can be a great artisan and can produce good things." All this led the counsel for the Civil Rights Commission to declare "that it is just not possible to develop doctrine based on how expressive, how artistic the speech is."¹⁹⁰

¹⁸⁶ Masterpiece Cakeshop v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1729-32 (2018).

¹⁸⁷ Transcript of Oral Argument at 11, Masterpiece Cakeshop v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1729-32 (2018) (No. 16-111).

¹⁸⁸ *Id.* at 11-18.

¹⁸⁹ *Id.* at 39-40.

¹⁹⁰ *Id.* at 78-79.

Confusion runs through the discussions like a hair in a sausage. Why is a baker an artist when certain others contributing skill and creativity to weddings are not? How to distinguish art from craft? Why valorize traditional art in defining the art of today? What is striking is less the poverty of the replies than the obvious observation that no one had read or thought deeply about the issues.

Only Justice Thomas in his opinion raised the question of the constitutional status of art. Concurring, he thought baking the cake constituted “expressive” conduct protected by the First Amendment. The baker, he added, “considers himself an artist. The logo for the Masterpiece Cakeshop is an artist’s paint palate with a paintbrush and baker’s whisk. [The baker] takes exceptional care with each cake that he creates – sketching the design out of paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding.”¹⁹¹

If Thomas’ point is that baking the cake is a communicative activity – presumably, not unlike such communicative activities as running a red flag up a pole¹⁹² or wearing a funereal armband to school¹⁹³ – it is reasonably clear, if perhaps not persuasive. But why the excursion into art? Is Thomas resting his argument on the activity as protected art? If so, there is an obvious and unaddressed problem: cake baking, even sophisticated cake baking, is not so clearly an art form as, say, painting or drawing. We may not need a definition of art to agree that *The Last Supper* is a work of art, but we do if the subject is Masterpiece’s wedding cake, which arguably falls under the heading of craft. Is Thomas’ rebuttal claiming that in determining whether an object qualifies as a work of art, we need to ask only if the person responsible calls himself an artist? Or if he prepared his work carefully? But why rely on the creator’s self-serving view of himself? Why emphasize preparation, if in the end our concern is only with the final product? Where Danto and Dickie insisted on artworld gatekeepers, Thomas apparently would dispense with them altogether. Where they ask that we trust the critic, he asks (like Kosuth) that we trust the self-designated artist. It is hard to evaluate Thomas’ approach as an improvement on the discussions of earlier critics.

VSMsq Structural Engineers, LLC v. SStructural Consultants Associates (2023),¹⁹⁴ a Texas court of appeals (Houston) case, involved the Texas Citizens Participation Act, which protects speech on matters of public concern. SCA claimed that VSMsq posted images of buildings on its website that had been engineered by SCA, misappropriating the images and deceiving the public. VSMsq replied that the law protects artistic commercial speech, that the buildings on the site were artistic works, and thus that the posting was protected by the First Amendment.

The problem was that the law did not define “artistic work” nor did Texas case law offer an answer. The court, as a result, was moved to provide a pair of definitions: a “[c]reative expression, or the product of a creative expression” or an “occupation or business that requires skill, a craft.” VSMsq countered that “engineering has long been recognized to be an art form in addition to a scientific endeavor.” The court found that VSMsq had either to demonstrate an “element of

¹⁹¹ *Masterpiece Cakeshop*, 138 S. Ct., at 1742.

¹⁹² *Stromberg v. California*, 283 U.S. 359 (1931).

¹⁹³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹⁹⁴ *VSMsq Structural Engineers, LLC v. Structural Consultants Assocs., Inc.*, 679 S.W.3d 767 (Tex. App. 2023).

creative expression” or show that the “buildings are ‘artistic works,’” but that it had failed to do so. Accordingly, it denied the artistic expression exemption and refused to dismiss SCA’s misappropriation claim.

What is most striking is the court’s feeble efforts to define or describe artistic expression. In focusing only on Texas law, which it conceded was quite inadequate, it entirely ignored the vast literature on the subject. If art is synonymous with creative expression, how to distinguish it from creative expressions in science or business? Or do they also become art? Or if art is an occupation that requires skill, is it then indistinguishable from nearly all occupations? And can “art” refer both to product and producer? The opinion is hopelessly muddled, and it never bothered even to address the practical question before it: how to determine whether a building embodies artistic expression? When one considers Jefferson’s Monticello or a decrepit garage, the answer seems obvious: the former is artistic and the latter is not. Yet this view implies that only good art deserves the label, introducing an element of subjectivity that undermines the value of the concept.

Andy Warhol Foundation v. Goldsmith (2023) raised philosophical issues in the context of copyright law. A prominent celebrity photographer, Lynn Goldsmith, on assignment from *Newsweek* shot several portraits of the rock star Prince for use in the magazine, though none of the photographs were actually used. A few years later, *Vanity Fair* magazine licensed one of the photographs for \$400 for one time only for a story on Prince, and *Vanity Fair* hired Andy Warhol to produce a work based on the photograph, with credit to Goldsmith acknowledged. In total, Warhol created fifteen additional works based on the photograph, now owned by museums, galleries, and collectors and reproduced hundreds of times in books, magazines, and promotional materials. Goldsmith learned of the fifteen copies over thirty years later in 2016, when *Vanity Fair* contacted the Foundation, which asserted copyright in them, to republish the photograph, paying it \$10,000 to license its use. Goldsmith received nothing. She asserted copyright infringement, and the Foundation sued her, claiming that Warhol’s works conveyed a different meaning from Goldsmith’s and thus were transformative and protected under fair use.¹⁹⁵

The Supreme Court, with Justice Sotomayor speaking for a seven-two majority, found for Goldsmith. Over thirty years earlier, Judge Pierre Laval of the Southern District of New York writing in a widely cited article had promoted transformativeness as a justification for secondary use in copyright law.¹⁹⁶ In *AWF*,

¹⁹⁵ *Andy Warhol Foundation v. Goldsmith*, 143 S. Ct. 1258 (2023). The Second Circuit explained that fair use comprises four elements: the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. It concluded that all four supported Goldsmith.

¹⁹⁶ Pierre N. Laval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). By “transformative,” he meant that the “use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.” This requires that the “secondary use adds value to the original . . . for the enrichment of society.” *Id.* at 1111. It is not the only factor to be considered, he conceded, and it may be outweighed by other considerations, but it must be taken into account. Thus, Laval downplayed the significance of the artist’s intent and emphasized the effects of his efforts. Four years later, the Supreme Court endorsed his approach, recognizing that the extent of the

the Court had granted review on the meaning of “transformative,” and Sotomayor was skeptical that Warhol’s works met this standard, emphasizing that they made only “modest alterations”¹⁹⁷and preserved Goldsmith’s photograph’s essential nature. Several photographs were integrated in the text to illustrate her points.¹⁹⁸

Transformation in her eyes, however, was trumped by a more important consideration: both the original and secondary works shared a common purpose, commercial licensing. Warhol’s work, therefore, seemed derivative. *Vanity Fair* needed a picture of Prince; it could have picked either Goldsmith’s or Warhol’s; it chose Warhol’s. However, the point of fair use was to protect copyright owners from the derivative use of their work. *Vanity Fair*’s use of Warhol’s work is substantially the same as that of Goldsmith’s photograph. “To hold otherwise,” Sotomayor wrote,

would potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals. As long as the user somehow portrays the subject of the photograph differently, he could make modest alterations to the original, sell it to an outlet to accompany a story about the subject, and claim transformative use.¹⁹⁹

Sotomayor sees what she sees; everything is on the surface. As for the dissent, “its single-minded focus on the value of copying ignores the value of the original works.”²⁰⁰

In a vigorous and lengthy dissent, Justice Kagan “just kind of went at [Sotomayor] hammer and tong.”²⁰¹ Her central point was that the majority failed to understand the nature of transformativeness, and thus was unable to grasp Warhol’s art as adding something new. As they saw it,

It does not matter that the silkscreens and the photo do not have the same aesthetic characteristics and do not convey the same meaning. . . . All that matters is that Warhol and the publisher entered into a licensing transaction, similar to one Goldsmith might have done.²⁰²

transformation might vary a good deal. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). The secondary use may comment on the original or on some other societal or other matter. The Copyright Act of 1976 had defined a derivative work to have “recast, transformed, or adapted” a prior work. 17 U.S.C. sec. 101.

¹⁹⁷ *Andy Warhol Foundation v. Goldsmith*, 143 S. Ct. 1258, 1285 (2023).

¹⁹⁸ Perhaps no case has generated such an intense use of pictures. An analysis of opinions from 1997-2009 revealed only twenty-three cases with forty-two pictures, nearly all maps, charts, graphs, and diagrams. Nancy Marder, *The Court and the Visual: Images and Artifacts in U.S. Supreme Court Opinions*, 88 CHI-KENT L. REV. 331, 334-38 (2013).

¹⁹⁹ *Andy Warhol Foundation v. Goldsmith*, 143 S. Ct. 1258, 1285 (2023).

²⁰⁰ *Id.* at 1286.

²⁰¹ Kagan, qtd. in Josh Gerstein, *Kagan Enters Fray Over Congress’ Power to Police Supreme Court*, POLITICO, Aug. 3, 2023, <https://www.politico.com/news/2023/08/03/kagan-enters-fray-over-congress-power-to-police-supreme-court-00109770>.

²⁰² *Andy Warhol Foundation*, 143 S. Ct., at 1292.

This “commercialism-uber-alles view”²⁰³ undercuts “copyright’s core purpose . . . to foster creativity.”²⁰⁴ “Fair use proceeds from the understanding that artists cannot do what they do without borrowing from or otherwise making use of the work of others,” and so it “advances creativity and artistic progress.”²⁰⁵ “Andy Warhol is the avatar of transformative copying.”²⁰⁶ Like Sotomayor, Kagan included photos to buttress her case, though in addition to depicting works of the parties, it also included masterpieces by Giorgione, Titian, and Manet, implying that Warhol was of their stature.

In a conversational tone that invites the reader to look at the pictures with her, Kagan then discussed Warhol’s “laborious and painstaking”²⁰⁷ technique in the context of his famous portrait of Marilyn Monroe, echoing Danto: “the meaning is different from any the photo had.”²⁰⁸ For Kagan, seeing is important, but it must be supplemented by context, history, expert commentary, and the like. A magazine editor deciding which to use to accompany an article would immediately see what the majority evidently misses: that they convey different messages.²⁰⁹ “The majority thus treats creativity as a trifling part of the fair-use inquiry.”²¹⁰ Courts had been pretty flexible toward artists working off preexisting art, and Kagan worried that the majority was abruptly altering rules that had been settled and sensible. Both opinions overflowed with personal barbs, an unexpected development in view of the justices’ history of broad agreement.²¹¹

It is probably fair to say that when Sotomayor viewed the silkscreen she saw Prince, and when Kagan viewed it, she saw Warhol. This, in turn, reflected very different ways the two Justices, normally allies, approached the case. For Sotomayor, the dispute was over money. As both sides used the photograph for commercial purposes, it was their similarity that most impressed her, signaling that the second work infringed on the copyright of the first. The dissenters, perhaps defeated by artspeak, were unable to discern what was plain to those not mesmerized. We are judges, she implied, not art critics, and concentrating on use saves us from the morass of aesthetics.²¹²

For Kagan, this was the view of a philistine. “There is precious little evidence in today’s opinion that the majority has actually looked at these images, much less that

²⁰³ *Id.* at 1303.

²⁰⁴ *Id.* at 1292.

²⁰⁵ *Id.* at 1293.

²⁰⁶ *Id.* at 1293.

²⁰⁷ *Id.* at 1296.

²⁰⁸ *Id.* at 1294.

²⁰⁹ *Id.* at 1297.

²¹⁰ *Id.* at 1311.

²¹¹ In the preceding year, Sotomayor and Kagan had agreed on 90% of cases where two Justices joined at least part of the same opinion and 78% where two Justices joined the same opinion in all parts without writing separate opinions. These were the highest levels of agreements between any two Justices that term. ANGIE GOU, ELENA ERSKINE, & JAMES ROMOSER, SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT, 2021-22 TERM 15 (July 7, 2022), <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf>.

²¹² Concurring, Justice Gorsuch remarked, “Nothing in the law requires judges to try their hand at art criticism and assess the character of the resulting work.” *Andy Warhol Foundation*, 143 S. Ct. at 1289.

it has engaged with expert views of their aesthetics and meaning.”²¹³ No one could possibly mistake the portraits for each other because it was obvious that Warhol imbued his with a meaning far different from Goldsmith’s. The majority does not understand what art is or how artists work. To Sotomayor, Kagan’s argument must have seemed the pretentious ruminations of an academic philosopher. To Kagan, Sotomayor’s argument must have seemed more likely to come from an accountant than from the most liberal voice on the Court. Neither seemed to notice that their focus was only on reproductions, not on the originals, a fact that might have proven germane in assessing their character.

V. CONGRESS SPEAKS

In 1990, attached to the Judicial Improvements Act that authorized eighty-five federal judgeships and without floor debate, Congress passed the Visual Artists Rights Act (VARA), which acknowledged and protected the artist’s moral rights to integrity and attribution. The right to integrity permits the artist to claim limited control over her work, even when it had been sold and passed to other hands, and to prevent the “intentional distortion, mutilation or modification”²¹⁴ of works or the destruction of those of “recognized stature.”²¹⁵ Common sense exceptions, as for wear and tear and conservation, were allowed. The right to attribution protects the artist’s power to be recognized by name as the creator of the work.²¹⁶ The rights remain in force to the end of the artist’s life. The legislation, with its triumph of artists over real estate interests, had a decided David-and-Goliath character.

The assumption behind this “moral right” was that “an artist’s professional and personal identity is embodied in each work created by that artist,”²¹⁷ entitling her to some control of her work.²¹⁸ Also, it was thought that the rights promised societal as well as individual benefits, in that they served the public interest by encouraging artists and preserving their work.²¹⁹ Moral rights, which had originated in France,²²⁰

²¹³ *Id.* at 1301.

²¹⁴ 17 U.S.C. § 106A(a)(3)(A).

²¹⁵ *Id.*, at (B). Prior to the adoption of the law, American courts refused to recognize moral rights. *Vargas v. Esquire*, 164 F. 2d 522 (7th Cir. 1947); *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S. 2d 813 (S. Ct. 1949).

²¹⁶ 17 U.S.C. § 106A(a)(3)(A).

²¹⁷ H.R. Rep. No. 101-514, at 15 (1990).

²¹⁸ The assumption that this melding of identity to product is unique or even distinctive to art is open to challenge. For example, many proprietors of small businesses doubtless feel the same about their creations. Jack Welch, the former CEO of General Electric, made a similar claim in *JACK WELCH, JACK STRAIGHT FROM THE GUT* (2001).

²¹⁹ Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 *HOFSTRA L. REV.* 317, 325-26 (1989). The societal purpose is to some degree undermined by the VARA protection ceasing with the death of the artist.

²²⁰ See Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 *HARV. L. REV.* 554 (1940). This, in turn, has been traced to the writings of Kant and Hegel. Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral between France and the United States*, 22 *COLUM.-VLA J.L. & ARTS* 361, 370-72 (1998).

had earlier been recognized by the Berne Convention, a century old international copyright treaty,²²¹ which Congress had joined in 1988.²²²

Unlike courts, VARA defined visual art as a “painting, drawing, print, or sculpture, existing in a single copy [or] in a limited edition of 200 copies or fewer.”²²³ Excluded were “any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work . . . any merchandising item or advertising . . . any work made for hire.”²²⁴ Would this exclude a clay statue used in preparation of a bronze statue?²²⁵ How about photographic prints given to an artist to be used as a basis for a painting?²²⁶

VARA’s very traditional notion of art was hardly welcoming to the new work that had already become commonplace for decades. For example, the conceptual artist, Chapman Kelley, created an award-winning garden in Chicago that he called Wildflower Works, maintained it at his own expense for almost twenty years, and finally saw the city destroy it. The Seventh Circuit declined to classify it as a work of art under VARA, as it did not meet the legal definition.²²⁷ “To qualify for moral-rights protection under VARA, Wildflower Works cannot just be ‘pictorial’ or ‘sculptural’ in some aspect or effect. It must actually be a ‘painting’ or a ‘sculpture.’ Not metaphorically or by analogy but really.”²²⁸ The court worried, too, that calling the installation art would invite an “infinitely malleable” definition.²²⁹

VARA’s “recognized stature” requirement also raises questions. The term, which the statute does not define, has an obvious practical ambiguity. Will courts determine that stature attaches to the work of art or will they infer it from an artist’s reputation?²³⁰ The term has been interpreted in *Carter v. Helmsley-Spear* to mean “viewed as meritorious” or “recognized by art experts, other members of the artistic community, or by some cross section of society,”²³¹ that is, a matter of “common sense.”²³² But is it really common sense to ask juries to make this determination

²²¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris July 24, 1971, and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

²²² Pub. L. No. 100-568, 102 Stat. 2853. The United States considered the Convention an executory treaty requiring implementation legislation by Congress. *See* § 2(1).

²²³ 17 U.S.C. § 101. Unlike moral rights, the Constitution’s copyright provision is justified solely by the societal interest “to promote the progress of science and the useful arts.” U.S. CONST. art. I, § 8, cl. 8. Moral rights also differ in that copyright holders’ interests are mainly pecuniary.

²²⁴ 17 U.S.C. § 101. VARA was much narrower than the treaty, which protected all artistic and literary work.

²²⁵ The answer was no. *Flack v. Friends of Queen Catherine, Inc.*, 139 F. Supp. 2d 526 (S.D.N.Y. 2001).

²²⁶ The answer was yes. *Lilley v. Stout*, 384 F. Supp. 2d 83 (D.D.C. 2005).

²²⁷ *Kelley v. Chicago Park District*, 635 F. 3d 290, 306 (7th Cir. 2011).

²²⁸ *Id.* at 300.

²²⁹ *Id.* at 301. VARA may also have disincentivized property owners from installing artworks by limiting their power to relocate, remove or alter them. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 286 (2003).

²³⁰ *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (S.D.N.Y. 1994).

²³¹ *Carter v. Helmsley-Spear*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994). The Second Circuit did not address the definition in its appellate decision. *Carter v. Helmsley Spear*, 71 F. 3d 77, 84 (2d Cir. 1995).

²³² *Cohen v. G & M Realty*, 320 F. Supp. 3d 421, 428 (E.D.N.Y. 2018). Artists who had painted graffiti on a disused building for twenty years learned that it would be renovated

of merit as a finding of fact that will often bleed into a value judgment? For that matter, are lawyers and judges, whose entire professional lives are spent parsing verbal communication, prepared to make these determinations? Justice Holmes was skeptical, calling it “a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits.”²³³ The court in *Carter* made the same point,²³⁴ but if judges are forced to choose among art experts, the artistic community, and some cross section of society, it is hard to see how they could avoid it.

Nor are the references to art experts and some cross-section of society helpful, as they seem prone to generate contradictions and confusion. For example, large cross sections of society seem enamored of kitsch in Margaret Keane’s paintings of sad eyed children, Thomas Kinkade’s sentimental landscapes, and George Rodrigue’s blue dogs, but very few art experts would grant these artists much stature. Nor can problems be avoided by relying on expert witnesses to establish stature, as this tactic treats subjective opinions as establishing an objective reality. In a practical sense, moreover, a reliance on experts might favor established artists, who presumably need less protection than neophytes, and set up contests of opposing opinions, informed but inescapably personal and likely expressed in jargon unintelligible to juries and perhaps even to judges.²³⁵ In the end, by targeting quality, VARA approves the principle that government can act “simply on the basis that some speech is not worth it.”²³⁶

Also, in excluding works for hire, that is, “work prepared by an employee within the scope of his or her employment,”²³⁷ VARA failed to define “employee” and “employer” clearly, leaving courts dependent on a multipronged test set down by the Supreme Court prior to the passage of VARA in *Community for Creative Non-Violence v. Reid*.²³⁸ But why make the conditions of employment a key consideration in determining VARA protection for art, disqualifying large numbers of works in the process? Would we disqualify Tiffany glass as produced as work for hire? Or Michelangelo’s ceiling of the Sistine Chapel because it was commissioned by Pope Julius? Surely, our interest is in the work, not the employment status of those who created it. The purpose of the work for hire provision appears to be denying protection to artistic reproductions, especially mass reproductions,²³⁹ but by requiring a work of visual art to be an “original work of authorship,” one wonders

and their work destroyed; they asked the court to determine if any of their work merited VARA protection; before the court could rule, the building owner had the works painted over the artists sued, the court ruled that forty-five of the forty-nine works deserved protection, and the artists were awarded \$6.75 million.

²³³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

²³⁴ *Carter v. Helmsley-Spear*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994).

²³⁵ For example, in a case involving the proposed destruction of a sculpture in the lobby of an office building, the judge dismissed the judgment of a former long time art critic of the *New York Times* and the then current art critic and editor of *The New Criterion* as “myopic.” *Carter v. Helmsley-Spear*, 861 F. Supp., at 324. On the other hand, in *Martin v. Indianapolis*, the “recognized stature” of an outdoor sculpture was determined merely by reference to the local press. 192 F. 3d 608, 612-13 (7th Cir. 1999).

²³⁶ *United States v. Stevens*, 559 U.S. 460, 470 (Roberts, C.J. 2010).

²³⁷ VARA, *supra* note 214, at sec. 201(b)(2006).

²³⁸ 490 U.S. 730, 750 (1989).

²³⁹ U.S.C.C.A.N. 6915 (1990).

whether Warhol's famous "Brillo Box" would qualify."²⁴⁰ Warhol's silk screens of Elizabeth Taylor and Marilyn Monroe would earn VARA protection because fewer than 200 copies were made, but why should they be denied if he decided to make more than 200 copies? Why should the number of copies be dispositive?

There is also the matter of "applied art." *Cheffins v. Stewart* (2016) concerned a pair of artists, who transformed a disused school bus into an elaborate Spanish galleon for use at various festivals. Stewart, who owned the bus/galleon, burned it to salvage scrap metal; the artists sued, maintaining that in destroying the bus/galleon, Stewart had violated VARA by destroying their work of art. The case turned on whether the bus/galleon was applied art, and thus unprotected by the law.

The Ninth Circuit defined applied art as covering an object "that initially served a utilitarian function and . . . continues to serve such a function after the artist made embellishments or alterations to it."²⁴¹ As the bus/galleon was still used to transport people, it "retained a largely practical function [and] plainly was 'applied art.'"²⁴² A concurring opinion complained that the "majority's formulation may protect the clearest cases," but would leave other cases "out in the cold . . . turning judges into art critics or consigning to litigation every work of art that includes some utilitarian function."²⁴³ In defining applied art, it concluded, "the right question to ask is whether the primary purpose of the work as a whole is to serve a practical, useful function, and whether the aesthetic elements are subservient to that utilitarian purpose."²⁴⁴ The concurrence seems easier to implement, until one reads the next sentence, which without offering justification, announces that the bus/galleon qualifies as applied art, when an opposite conclusion appears to have been equally plausible.

A few years earlier, the Second Circuit had proposed a solution to the applied art question. "VARA may protect a sculpture that looks like a piece of furniture, but it does not protect a piece of utilitarian furniture, whether or not it could arguably be called a sculpture."²⁴⁵ How to tell sculpture that looks like a piece of furniture from a piece of furniture? Is the answer Danto's answer, that is, inquire of the artworld?

Another question *Cheffin* raises is exactly whose First Amendment rights are in play? The law assumes it is the rights of the artists to control their work, but arguably the owners of the work also possess these rights.²⁴⁶ If an owner decides that he dislikes what the work communicates, would forcing him to display it amount to compelled speech? And what of the audience, actual or potential? The applied art loophole permitted the court to sidestep the question, and so it remains unaddressed.

²⁴⁰ See 17 U.S.C. § 101.

²⁴¹ *Cheffins v. Stewart*, 825 F. 3d 588, 594 (2016).

²⁴² *Id.*, at 596. A sculptor sued a real estate company on the ground that moving his stationary site-specific art from a Boston park violated VARA. The First Circuit ruled that VARA did not apply to site specific art. *Phillips v. Pembroke Real Estate, Inc.*, 459 F. 3d 128 (2006).

²⁴³ *Cheffins*, 825 F. 3d, at 598.

²⁴⁴ *Id.*

²⁴⁵ *Pollara v. Seymour*, 344 F. 3d 265, 269 (2d Cir. 2003).

²⁴⁶ In *Serra v. General Services Administration*, 847 F. 2d 1045 (2d Cir. 1988), the Second Circuit confirmed the GSA's authority to relocate a massive sculpture because the government had bought it and owned it. The relocation was justified by the inconvenience it imposed on pedestrians, not on aesthetics.

There is also, finally, the question as to whether the purpose of VARA, helping artists maintain their reputation, is a proper task of government. Apart from the very different law of libel, the law's general approach is to leave reputations to the marketplace. Even without the law, artists could defend themselves by negotiating more favorable contracts that would better safeguard their work or seeking to influence the artworld. Of course, this would not prevent some valuable art from being lost nor would it prevent some inferior art from being retained, but no solution will please everyone.

VI. SOME CONCLUSIONS

In a famous passage, Keynes observed that "Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist."²⁴⁷ We all apply theories to make sense of the hustle and bustle around us. Sometimes, the theories are explicit, like Danto's; whether or not one finds it useful or valid, one must concede that it is there for interested parties to examine, dissect, and evaluate. Courts, however, have not developed an explicit theory of art, and thus find themselves falling back on unexamined assumptions, perhaps years out of date, and emotional reactions, positive and negative, that may be quite incoherent, naïve or inconsistent, perhaps like the ideas of Keynes' defunct economist.

In this spirit, courts have continued to insist that art is protected by the First Amendment, without making any serious attempt to say what art is. For many years, a rough, unspoken consensus on defining art meant that this approach made perfect sense. Why enter the quagmire if there seems no reason to do so? By the twenty-first century, however, the old consensus on art had long ago been dropped in the rubbish bin, like a pair of worn-out shoes.

What have courts done to accommodate themselves to this no longer new reality? For the most part, they have been satisfied to apply dichotomies devised generations earlier, for example, contrasting high quality (art) and low quality (not art) or aesthetic purpose (art) and commercial purpose (sometimes art and sometimes not art) or aesthetic value (art) and utilitarian value (not art). These simplistic and occasionally contradictory responses may strike some observers as little short of a dereliction of duty.

Is the whole enterprise doomed? Sontag famously attacked interpretation itself. In the name of making the object "intelligible [and] disclosing its true meaning [it] excavates, and as it excavates, destroys; it digs 'behind' the text to find a sub-text which is the true one." Thus, she concluded, "interpretation is the revenge of the intellect upon art. . . . To interpret is to impoverish, to deplete the world – in order to set up a shadow world of 'meanings.'"²⁴⁸ Interpretation entails a kind of betrayal.

Yet the practical question remains: How can courts advantage or disadvantage art without a satisfactory definition of what it is? Danto offers an exit from the morass. Delegate the issue to respected (if self-appointed) experts: art is whatever the artworld says it is. It is true that the artworld has shown that it believes that

²⁴⁷ JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 383 (1936).

²⁴⁸ SUSAN SONTAG, *AGAINST INTERPRETATION AND OTHER ESSAYS* 6, 7 (1966).

under the proper circumstances art can cover anything at all. Or even nothing. As a consequence, those not yet conversant with the secrets and mysteries of Dantovian analysis might sometimes find the results silly or bizarre.

But considering the alternatives, the analysis might make imperfect sense. Why conjure up a new definition of art, when the odds of its attracting a consensus seem remote? Why continue struggling with traditional definitions, old fashioned, out of date, and difficult to usefully apply to the art of today? Aristotle warned that we must not expect more precision than the subject matter permits,²⁴⁹ and plainly defining art does not permit much precision. Similarly, the renowned constitutional scholar, Alexander Bickel, considered prudence the indispensable judicial asset, lauding judges skilled in the “ways of muddling through.”²⁵⁰

Accordingly, it is no wonder that courts sometimes seem to have adopted the Dantovian philosophy *sub silentio*, probably, without even bothering to become familiar with the sacred texts. If scholars over the centuries have failed adequately to define art, judges preoccupied with the specific disputes before them, can hardly be blamed for ducking the issue. Thus, when the Supreme Court announces that Pollock’s drip paintings fall under the First Amendment’s protection, it does not pause to connect them to conventional free speech justifications, like the pursuit of truth or democratic accountability. Instead, it simply announces it, as if it were too obvious to require justification.²⁵¹ As Pollock’s paintings were nearly a half century old and the painter a presence in the pantheon, this announcement seemed merely stating what in the artworld passed for conventional wisdom. Similarly, *Carter’s* construing “recognized stature” as “recognized by art authorities” and Kagan’s passionate dissent in *AWF* also follow the Dantovian path (though neither felt the need to mention Danto by name). This would allow courts to skirt the controversy, avoid trouble, and proceed as if they were merely ratifying the general agreement that art is what the artworld says it is. Never mind that it has no statutory basis. It is entailed by a “clearly widespread intuition.”²⁵² The alternative, as Kagan implies, is likely more of the stumble and bumble that characterizes the courts’ ongoing efforts. Are there viable alternatives to the Dantovian approach? The courts have not found them.

²⁴⁹ ARISTOTLE, *NICOMACHEAN ETHICS* BK. I, at 3 (W.D. Ross trans. & ed., 1908) (c.384 B.C.E.) (1094b.24ff).

²⁵⁰ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 64 (1962). Relatedly, Bickel was sympathetic to the ideas of Edmund Burke, skeptical of idealism and respectful of tradition. Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 *YALE L. J.* 1567, 1600-605 (1985).

²⁵¹ *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). This case, so often cited as seminal in the relation of art to the First Amendment, had nothing to do with art. It concerned whether a gay rights group was entitled to march in a Saint Patrick’s Day parade. The often-quoted sentence was mere dicta.

²⁵² Mark Tushnet, *Art and the First Amendment*, 23 *COLUM. J. L. & ARTS* 169, 197 (2012).

LEGAL PROFESSIONAL PRIVILEGE IN A DIGITAL WORLD: A COMPARATIVE ANALYSIS

Lissa Griffin* and Dan Jasinski**

ABSTRACT

This Article considers the impact of digitalization on the legal profession through the lens of the oldest privilege recognized in law - the legal professional (or attorney-client) privilege. The Article focuses on new challenges to private lawyer-client communications, changes to the ways in which lawyer's store client information, and how the privilege can be protected. Matters explored include the search of lawyers' offices, seizure of their devices and remote participation at hearings. Through a comparative analysis of the U.S and English rules of evidence, ethical considerations and court decisions, the Article sets out the key concerns raised by the digital age concerning protection of the right to communicate privately with one's lawyer.

KEYWORDS

Attorney-client Privilege, Digitalization, Legal Professional Privilege, Searches of Lawyer's Offices

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INTRODUCTION, BACKGROUND AND CONTEXT

Legal professional privilege is a “fundamental human right long established in the common law’ constituting ‘a necessary corollary of the right of any person to obtain skilled advice about the law’”.¹ The privilege is considered the cornerstone of the lawyer-client relationship because effective legal assistance requires full disclosure of the client’s problem, which can only take place if the client is assured that their communications cannot be revealed. It also reinforces the broader confidentiality protection where exceptions to confidentiality would allow disclosure of client secrets.²

This Article analyses legal professional privilege in the context of the technological enhancements that have occurred in the 21st century in two common law jurisdictions: the United Kingdom and the United States. Just as the Industrial Age revolutionized the operating environment of those working in manufacturing, the Digital Age has done the same for those working in the tertiary sector. The increased potential for intrusion from digitalisation, including the personal computer, the internet, cloud storage, and the cell phone has changed the way in which lawyers communicate with clients, store files, access case bundles, and attend court. At the most basic level, the increased risk of being overheard or intercepted whilst engaging in communication remotely via email, video link or cell phone presents a clear risk to privilege, whether clients are communicating from a police station or prison or to a lawyer who is on the move, perhaps between meetings or court hearings. In addition, new methods of digitally storing client files and potentially privileged documents provide a resounding change in when and how searches of lawyers’ offices may be conducted and files and document seized and pose new risks to privilege in relation to all, even unrelated, clients of a lawyer whose devices and files are subject to search and seizure. The evidentiary and ethical rules that govern the lawyer-client relationship need to keep pace with technological developments. If they do not, the consequences from the perspective of privilege and confidentiality are potentially profound.

The scope of the privilege has been increasingly addressed by the courts; some courts have curtailed it; other courts have broadened it; and others have simply

¹ Lord Clarke in *R. (on the application of Prudential plc and another) v. Special Commissioner of Income Tax and another* [2013] UKSC 1, [141], citing Lord Hoffman in *R. (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax* [2002] UKHL 21 [7]. The term “Legal Professional Privilege,” as used in this Article includes two distinct privileges: Legal Advice Privilege and Litigation Privilege, a position recognized by Lord Carswell in *Three Rivers District Council and Others v. Governor and Company of the Bank of England* [2004] UKHL 48 [103]. We also use the term “Legal Professional Privilege” to include the US attorney-client privilege (largely protecting attorney-client communications) and the US work product privilege (largely protecting materials prepared for litigation and materials that reflect the attorney’s mental processes), when collectively referring to both jurisdictions. Each of these protections will be discussed further, *infra*.

² For example, in the United States, the American Bar Association, MODEL RULES OF PROF’L CONDUCT r. 1.6(6) (AM. BAR ASS’N 1980) permits disclosure of confidential information “to comply with other law or a court order.” The US attorney-client privilege is intended to add protection to confidential communications between the client and the lawyer for the purpose of legal advice if sought by a subpoena or court order.

created uncertainty and thus weakened the protection of the privilege. The nature of communications that may be subject to privilege (e.g., business, law or mixed advice) and the kinds of lawyers to whom it may apply (e.g., in-house counsel, outside counsel, non-legally qualified personnel) have recently come under new or fresh scrutiny. The same is true for protection of digital information, seized, inadvertently disclosed, or otherwise. The lack of resolution of these issues creates increased challenges and risks to the privilege because lawyers and clients cannot be certain whether their communications will be protected. The potential for intrusion into the lawyer client relationship places limits on the core rights linked to legal representation, in addition to the right to counsel itself.

Historically, the two jurisdictions define the scope and nature of the privilege somewhat differently and have also dealt with digital challenges in different ways. For that reason, this Article is comparative in nature, capturing long-standing rules and surveying new approaches and new practices, to the extent they exist. Part I addresses the definition and scope of the privilege in England and Wales and in the United States. It demonstrates that there is greater protection for lawyer client communications in the United States than in England and Wales, and suggests that this perhaps reflects differences in the values of client individual autonomy and the lawyer-client relationship. Part II addresses the challenges to the privilege presented by digitalization in several contexts: communications generally, including from or to jails and prisons; searches of lawyers' offices; protection of stored information; and virtual proceedings. Part III compares and contrasts the privileges in England and Wales and the United States and draws some ideas from other civil law systems. Part IV includes recommendations for protecting the privilege against the challenges in the digital age.

I. LEGAL PROFESSIONAL/ATTORNEY-CLIENT PRIVILEGE

A. DEFINITION AND SCOPE

The legal professional privilege is the oldest privilege recognized in law.³ In England and Wales and the United States, and indeed many jurisdictions across the world,⁴ the privilege protects from compelled disclosure communications between a client and their lawyer or the lawyer's agents, made in confidence, for the purpose of seeking legal advice. Without it, clients and lawyers could not speak freely without fear that their conversations could be disclosed. While closely akin to its sister doctrine of confidentiality, which, with exceptions, protects *any* information received by counsel in the course of representation from *any* source, the privilege protects only the content of the communication itself. Moreover, unlike confidentiality, which is governed by rules of ethics, privilege is a rule based on evidence law.⁵ As such, again unlike confidentiality rules found in ethics materials, privilege rules are found in statutes and judicial opinions. In

³ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

⁴ For an unrivalled insight into the various approaches to privilege around the world, see: DLA Piper, *Legal Professional Privilege: Global Guide*, <https://www.dlapiperintelligence.com/legalprivilege/insight/> (accessed 29 July 2024).

⁵ See, e.g., Fed. R. Evid. 501; Police and Criminal Evidence Act 1984, c. 60, § 10 (UK).

criminal cases, it is closely related to protection of the right to effective assistance of counsel.⁶ Indeed, expanding on a point made by Gross LJ, in the context of legal professional privilege, there exists what is arguably a diametrical dialectic between the effective and efficient prosecution of a crime and a suspect's right to effective legal advice and representation, of which lawyer-client privilege plays a vital part.⁷ In essence, it can quite readily be argued that privilege stands in the way of the truth-seeking function of criminal proceedings,⁸ meaning there is a clear balance to be struck in order to ensure just outcomes in such proceedings. The way in which the law seeks to strike the right balance in this context is explored throughout this Article.

Legal professional privilege covers communications by any method, and in the past was interpreted and applied to letters, telephone calls, and faxes. Today, there exists an astonishing array of methods of communication that challenge the legal professional privilege, for example, emailing, texting, blogging, and posting. In addition, new forms of storage for lawyer-client communications, for example, the cloud, digital files, and external storage facilities raise questions about how to protect what they contain. Moreover, post-COVID, virtual proceedings have gained legitimacy challenging the protection of lawyer-client communications in that context. It is fair to say that the right to effective representation is a cornerstone of adversarial-based systems like those of England and Wales and the United States, such that any failure of the privilege to keep pace with the world in which it exists, puts at risk legal professional privilege and, consequentially, the fairness and safety of verdicts in those systems.

B. ENGLAND AND WALES⁹

The existence of legal professional privilege, whilst somewhat limited in scope¹⁰ is a vital component of the adversarial system in England and Wales, particularly in the context of ensuring the provision of accurate legal advice and robust representation during litigation. To this end, privilege is an exception to the general rule that evidence that is relevant and reliable is, *prima facie*, admissible.

⁶ AM. BAR ASS'N, *supra* note 2.

⁷ *R. (A and another) v. Central Criminal Court & another* [2017] EWHC 70 (Admin). See also: *R. (on the application of Prudential plc & another) v. Special Comm'r of Income Tax & another* [2013] UKSC 1. Indeed, the rationale for the existence of privilege is arguably axiomatic, in that it 'ensure[s] ... "full and frank communications between lawyers and their clients," which "promote[s] broader public interest in the observance of law and administration of justice" *R. (A and another) v. Central Criminal Court and another* [2017] EWHC 70 (Admin). See also, *R. (on the application of Prudential plc & another) v. Special Commissioner of Income Tax & another* [2013] UKSC 1 ¶ 21, citing Justice Rehnquist in *Upjohn Co. v. U.S.* 449 U.S. 383, 389 (1981).

⁸ *Fisher v. U.S.* 425 U.S. 391, 403 (1976).

⁹ Distinguished as a jurisdiction within the United Kingdom as Scotland and Northern Ireland are recognized as separate jurisdictions for *inter alia*, criminal justice purposes. See further Akash Paun & Kelly Shuttleworth, *Criminal Justice & Devolution*, INST. FOR GOVT. (Apr. 07, 2020), <https://www.instituteforgovernment.org.uk/article/explainer/criminal-justice-and-devolution>.

¹⁰ *E.g.*, on the basis that it only applies to the lawyer-client relationship (to include in-house counsel) documents produced in relation to actual/contemplated litigation.

To the contrary, no matter how relevant and how reliable the evidence, privilege stands as a bar to its admissibility. Much more than this, however, the privilege is seen as a:

[F]undamental *human right* long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.¹¹

As far as Legal Advice Privilege¹² is concerned, the protection applies only to discussions that take place between two people, with one acting as lawyer and the other as client, where the lawyer is giving legal advice, or obtaining information in order to do so. In some contexts, this presents an interesting juxtaposition. For example, where a tax advisor provides advice to their client in relation to tax law, this will not be covered by privilege, as a tax advisor does not act as a lawyer to their client. Judges have, at times, found this difference in treatment of advice challenging to reconcile, not least as it is difficult to draw a just and defensible distinction between advice given by an attorney and that of any other professional competent to give advice in relation to the law.¹³ However, it would appear that, by reason of the fact that Parliament has enacted legislation which limits the privilege to advice provided by a lawyer,¹⁴ in addition to the need for certainty in this context, the protections afforded are limited to instances where an lawyer-client or prospective lawyer client relationship exists.¹⁵

¹¹ As noted by Lord Phillips of Worth Matravers in *In Re McE* [2009] UKHL 15 ¶ 6 citing Lord Hoffman in *R (Morgan Grenfell & Co Ltd) v. Special Commissioners of Income Tax* [2003] 1 AC 563 ¶ 7 (emphasis added).

¹² It is noteworthy that, in England and Wales there are two strands of Legal Professional Privilege. Namely, Legal Advice Privilege and Litigation Privilege. Legal Advice Privilege (LAP) is strictly applied to advice given via the lawyer/client relationship meaning that, even where a member of another profession is competent to give advice regarding the law, such advice shall not be covered by legal professional privilege. *See, e.g.*, in relation to accountants and tax law: *R. (on the application of Prudential plc & another) v. Special Comm’r of Income Tax & another* [2013] UKSC 1. Though it is true that in this particular case, Lords Sumption and Clarke (dissenting Justices) indicated that he saw no reason why, if legal professional privilege can cover foreign lawyers, there is no reason why it should not cover legal advice given by non-lawyers who are qualified to give such advice at ¶¶ 122-123 and 142 respectively. Litigation privilege applies where the ‘dominant legal purpose of the communication ... relate[s] to litigation which is pending, reasonably contemplated or existing at the date the advice was given’ *Staysure.Co.Uk Ltd v. The Comm’rs for Her Majesty’s Revenue & Customs* [2022] UKFTT 134 (TC) ¶ 298, citing *Serious Fraud Office v. ENRC* [2018] EWCA Civ 2006.

¹³ See the comments of Lord Hope in *R. (on the application of Prudential plc & another) v. Special Comm’r of Income Tax & another* [2013] UKSC 1 ¶ 78, where he makes reference to this issue in context of advice provided by Chartered Accountants.

¹⁴ *R. (on the application of Prudential plc & another) v. Special Comm’r of Income Tax & another* [2013] UKSC 1 ¶ 52.

¹⁵ *Id.* at 80. In this case, Lord Sumption dissented on the basis that ‘The privilege is a substantive right of the client, whose availability depends on the character of the advice

In addition, the role of in-house counsel, at least in the context of legal professional privilege, gives rise to perhaps paradoxical circumstances in this regard, as they are both “of” their employer, in the sense that they are seen as part of the business entity by which they are employed, but also tasked with providing advice to said business entity. However, cases such as *The Civil Aviation Authority v The Queen on the Application of Jet2.com Limited v The Law Society of England and Wales*¹⁶ render it clear that communication between in-house counsel and the business entity by which they are employed are capable of being covered by legal professional privilege.¹⁷ As such, while the position of privilege regarding in-house lawyers is less clear-cut than that of external lawyers, Lord Denning made clear the rationale for including in-house lawyers within the scope of privilege, noting that:

‘[t]hey are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges’.¹⁸

In relation to criminal cases, legal professional privilege is enshrined in s. 10 Police and Criminal Evidence Act 1984.¹⁹ In England and Wales, while “[t]he evidential burden of establishing privilege is on the party claiming it” save for exceptional circumstances, the ability to waive privilege rests wholly with the client.²⁰ Interestingly, in contrast to the protection in the United States, the presence of a third party does not preclude privilege.²¹

which he is seeking and the circumstances in which it is given. It does not depend on the adviser’s status, provided that the advice is given in a professional context’ (¶ 114). Lord Clarke, also dissenting, stated that ‘[i]t is... clear that [the privilege] is not limited to advice given by solicitors and barristers. If it extends to foreign lawyers, it is to my mind impossible to see how it can properly be denied in the case of advice given by an accountant qualified to give advice on the law of tax’, ¶ 142.

¹⁶ [2020] EWCA Civ 35.

¹⁷ *Id.* at 97 – 102.

¹⁸ Daniel Kenealy & Stuart MacLennan, *Legal Professional Privilege of Advice of the Attorney General*, 24 *Cov. L. J.* 78, 80 (2019) citing Lord Denning in *Alfred Crompton Amusement Machines Ltd. Appellants v. Customs & Excise Commissioners (No. 2)* [1972] 2 *QB* 102 ¶ 129.

¹⁹ Police and Criminal Evidence Act 1984, §10.

²⁰ *R. (on the application of Prudential plc and another) v. Special Commissioner of Income Tax & another* [2013] *UKSC* 1 ¶ 17.

²¹ This is particularly relevant when conversations occur in public. As it stands, there is no case law which suggests that conversations which take place in public are not subject to Legal Professional Privilege. Indeed, at first instance the Employment Tribunal in *Michael Curless v. Shell Int’l Ltd.* [2019] *EWCA* Civ. 1710 (appeal taken from Eng.) held that a conversation which took place at a public house was subject to Legal Professional Privilege. This was overturned on appeal by the Employment Appeal Tribunal, though there is no indication that this was due to the fact that the conversation took place in public. The Court of Appeal (¶ 53) held that the conversation was not admissible, but only insofar that it was considered to be ‘gossip’, as opposed to legal advice.

An aspect of legal privilege in England and Wales pertains to the failure to answer questions during police interrogation in reliance on legal advice.²² In the United States, of course, there is a right to remain silent under police questioning so that the defendant's rationale for remaining silent when asked questions by police is of no relevance to their guilt.²³ By contrast, in England and Wales a jury, when considering their verdict, may "draw such inferences from the failure to respond to police questioning] as appear proper".²⁴ In essence, this means that a trier of fact might infer a defendant's guilt where the defendant fails to mention facts, when questioned by the police, which they then subsequently raise at their trial.²⁵ Legal professional privilege is relevant to this in two key ways:

1. No inferences may be drawn where the defendant has been refused access to a lawyer; and
2. When a defendant is cross-examined on the reasons for raising facts when questioned, they might point to the advice provided to them by their legal advisor as the reason for doing so. This can involve the defendant waiving their right to privilege for that element of the advice between themselves and their lawyer²⁶ as well as their right to remain silent.

Initial disclosure by the police is often limited in nature, meaning that the, perhaps, safest option is for lawyers to advise their client to "go no comment". To this end, and to avoid a defendant needing to reveal that they remained silent on the basis of legal advice, "many solicitors who advise a client to remain silent in interview, now give that advice at the start of the tape recording".²⁷ This advice is then on record and "should... remove the risk of the client waiving privilege when giving evidence [at trial]".²⁸ It is also a question for the trier of fact, as to whether they believe a defendant when they say that their rationale for remaining silent was based on the advice they received at the time.²⁹

It should be noted that the right of an accused to claim privilege, is by no means absolute in England and Wales. Indeed, "whilst the case-law indicates that the power to override privilege is an exceptional remedy, only to be used with the greatest of care,"³⁰ privilege can, indeed, be overridden. An example, the so-called "Iniquity Exception" provides that, for instance, "privilege does not exist if the document comes into existence in relation to a fraud, crime or other iniquity".³¹

²² The relationship between silence based on legal advice and legal advice privilege has been described as "singularly delicate". See Natalie Wortley, *New Cases: Evidence and Procedure*, 41 CRIM. L. WK. 2 (2021).

²³ In addition, the U.S. law is clear that the jury may not draw any negative inference against a defendant based on their silence. *Griffin v. Cal.*, 380 U.S. 609 (1965).

²⁴ Criminal Justice and Public Order Act 1994, § 34.

²⁵ See JUDICIAL COLLEGE, *CROWN COURT COMPENDIUM: PART I: JURY AND TRIAL MANAGEMENT AND SUMMING UP 17-1* (2023).

²⁶ Wortley, *supra* note 22, citing cases such as *R. v. Bowden* [1999] All E.R. 43.

²⁷ DEBORAH SHARPLEY, *CRIMINAL LITIGATION AND EVIDENCE: PRACTICE AND PROCEDURE 2022/2023* 374 (The Univ. of L. Publishing Ltd, rev. ed. 2022).

²⁸ *Id.*

²⁹ JUDICIAL COLLEGE, *supra* note 25 at 17-4.

³⁰ *Lakatamia Shipping Co Ltd v. Su* [2022] EWHC 3115 (Comm) ¶ 14.

³¹ For recent judicial appraisal of this *Al Sadeq v Dechert* [2024] EWCA Civ 28

It matters not that the attorney may not be aware of their client's iniquitous intentions when accessing legal services.³² Examples raised in relation to crime or fraud include a client who it was felt might use a conference with counsel to cause criminal harm to their lawyer,³³ or solicitors instructed by a fraudulent gold dust trading scheme with the purposes of furthering the fraud.³⁴ Outside of crime or fraud, examples of alleged iniquity include advice pertaining to a redundancy scheme, which included discussion of how such a scheme might apply to a particular individual.³⁵ In addition to iniquity, it is possible for a statutory provision to erode the right to legal professional privilege, as was found in *Re McE*,³⁶ in which, albeit with some reluctance, it was held that the powers conferred by the Regulation of Investigatory Powers Act 2000 allowed law enforcement agencies to covertly surveil conversations likely to contain material protected by privilege, thus limiting the extent to which the rights of private consultation with one's lawyer can be considered to enjoy absolute privilege.³⁷

Finally, only the client may waive the privilege and in criminal cases, as the Court of Appeal made clear, a defendant has an unfettered right to waive privilege. Indeed, where a defendant is seeking to persuade a jury that advice from their solicitor led them to remain silent at police interview, this could be a sensible strategy.³⁸

A more complex situation arises when material is inadvertently disclosed to the other side in litigation. In essence, the inadvertent disclosure of material does not give rise to an automatic right for the other party to rely on that material in advancing their case. The disclosing party can apply to the court to prevent the receiving party from doing so but the applicant will have to demonstrate that a) the document is, in fact, privileged and b) that document has obviously been disclosed by mistake, or as a result of fraud on the part of the receiving party.³⁹ Should the

³² *Id.*

³³ *R v. Brown (formerly Latham)* [2015] EWCA (Crim.) 1328.

³⁴ *Addlesee v. Dentons Europe LLP* [2020] EWHC 238 (Ch.).

³⁵ *See Michael Curlless v. Shell Int'l td.* [2019] EWCA (Civ.) 1710. The Employment Appeal Tribunal found such an instance to be iniquitous and, consequentially, that an email containing such information should not be subject to privilege. However, the Court of Appeal disagreed, holding that the advice being sought was 'conventional' in this context. *See also, C. Pigott, Iniquity, privilege and an unwise conversation in the pub*, 169 (7865) N.L.J. 14 (2019).

³⁶ [2009] UKHL 15.

³⁷ *Id. See*, in particular, the comments of Baroness Hale of Richmond, at ¶ 57.

³⁸ *R. v. Inglis (Jason Richard)* [2021] EWCA (Crim.) 1545 ¶ 39.

³⁹ *Flowcrete UK Ltd. & Others v. Vebro Polymers UK Ltd.* [2023] EWHC 22 (Comm) ¶ 28. This is a civil case. However, it has been noted that such an approach is not devoid of application in criminal cases. *R. v. G* [2004] EWCA (Crim.) 1368 ¶ 16. *See also, C. Taylor, Inadvertent disclosure and the lawyer-client relationship*, 69 J. CRIM. L. 113, 114-115 (2005). In *R. v. G* an interesting situation arose, whereby defence barristers became aware of material which was inadvertently disclosed to them by the prosecution which was sensitive and subject to Public Interest Immunity. In order to limit the damage caused by the inadvertent disclosure, the trial judge ordered, on an interim basis, that the defence be prohibited from discussing the material with their clients, giving rise to a situation which undermined the barristers' ability to represent their clients, in that they are unable to take full instructions based on the information available to them, not least due to the constraints placed on the fullness and frankness of the lawyer/client

disclosing party not be able to do so, the receiving party will be able to utilize the material in the course of any hearing or trial.

C. THE UNITED STATES

As in England and Wales, the U.S. attorney-client privilege attaches to communications between a client⁴⁰ and attorney that are made for the purpose of legal advice, in confidence.⁴¹ This means the privilege does not protect non-legal advice.⁴² It also means that, unlike the broader protection in England and Wales, it does not protect even legal advice if a third party not necessary to the communication is present.⁴³ As in England and Wales, in the United States the privilege belongs to the client and can only be waived by the client.⁴⁴ If privileged communications are sought, the attorney has an ethical obligation to assert the privilege to avoid disclosure.⁴⁵ While the issue of privilege is not addressed directly in the ethical codes of conduct, the duty to keep all information relating to a representation confidential is very clear.⁴⁶

communication by such an order. The interim order was appealed and subsequently quashed by the Court of Appeal.

⁴⁰ Various rules have developed about who is a “client” for privilege purposes. A prospective client is considered to be a client for the purpose of establishing privilege. When the client is an organization, the privilege belongs to the organization not to any individual. Thus, counsel’s communication with corporate employees will be privileged if: the information is necessary to get legal advice; the communication was at the request of corporate superiors; the communication concerns matters within the scope of the employee’s employment; and the employees are aware that they are being questioned in order for the corporation to secure legal advice. *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

⁴¹ The definition was originally found in JOHN H. WIGMORE, EVIDENCE § 2292, 554 (John T. McNaughton rev. ed., 1961). As in England and Wales, information is protected both by the attorney-client privilege and by work-product immunity, which, like its English counterpart, provides some protection for documents prepared in anticipation or for the purpose of litigation in the absence of a showing of need. *See* Fed. R. Civ. P. 26(3)(a).

⁴² *Fisher v. U.S.*, 425 U.S. 391 (1976). In the United States, where both legal and non-legal communications are involved, the courts apply the privilege to the dual communications where the “primary purpose” is seeking legal advice. In 2023, *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2022), *cert granted*, 143 S. Ct. 80 (2022), *cert. dismissed as improvidently granted*, 143 S. Ct. 543 (2023)(per curiam) the Supreme Court granted certiorari and then dismissed the grant as improvidently granted in a case where it was presented with the question whether the test should be “primary purpose” or where legal advice is “a significant purpose” of the communication.

⁴³ *U.S. v. United Shoe Mach Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950). In essence, the rules in the US offer more certainty in terms of the extent to which conversations in situations where there cannot be a reasonable expectation of privacy.

⁴⁴ *See Re Lindsay*, 158 F.3d 1263 (D.C. Cir. 1998).

⁴⁵ This limitation to the actual attorney-client communication present in both the UK and the US is quite different from the broader protection in Spain, for example, where the doctrine of professional secrecy applies to any information received by the lawyer from whatever source in the course of representation. This is a much broader protection and is co-extensive with what would be covered by a lawyer’s ethical duty of confidentiality in the US and UK. Moreover, communications between lawyers are protected and may not be revealed without the approval of the relevant Bar Association.

⁴⁶ *See e.g.*, MODEL RULES OF PRO. CONDUCT r.1.6 (AM. BAR ASS’N 1983).

Since privilege is a matter of evidence law, its rules are governed by statute as interpreted by the courts according to “principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.”⁴⁷ In federal court, this means that the privilege is largely defined and interpreted by case law. On the other hand, some states have their own statutory provisions containing the rules on privilege.⁴⁸

There are various ways in which the privilege can be waived. Obviously, if a client purposely discloses confidential attorney-client communications to others the privilege will be waived. Moreover, since, unlike in England and Wales, in the United States the privilege will not attach if the communication is made in the presence of a third party, the new methods of communication raise serious issues of waiver because the privilege may also be waived if the communication takes place in a way that indicates it is not intended to be “in confidence,” i.e., where it can be overheard by a third party or in a public setting like speaking on a cell phone in a coffee shop, or using an open internet network, or some other way that does not indicate the communication is in confidence. It may also be waived inadvertently for example by including a third party in or using “reply all” in an email intended to be privileged. The privilege can be invoked at any time and continues even after the termination of the attorney-client relationship or the death of a client.⁴⁹ After a client’s death, the personal representative gains the power to assert or waive the privilege. Finally, while not constituting a waiver there is an exception to the privilege, the so-called “crime-fraud exception,” that removes the protection if the client’s purpose in seeking legal advice is to commit a crime or fraud.⁵⁰

As in England and Wales, the privilege covers in-house as well as external lawyers. However, regardless of which type of lawyer is consulted, the privilege only covers communications for the purpose of legal advice, not, for example, where business or non-legal tax advice is sought. A variety of factors are relevant to determining whether a communication is for a legal purpose, including 1) the extent to which the attorney performs legal and non-legal work for the client; 2) the nature of the communication,; and 3) whether the attorney had previously provided legal assistance in the same matter.⁵¹ The privilege is not lost just because

⁴⁷ Fed. R. Evid. 501. “Privilege in General.”

⁴⁸ See e.g., N.Y.C.P.L.R § 4503(1) (2023).

⁴⁹ Swidler & Berlin v. U.S., *infra* note 57 118 S.Ct. 2081 (1998).

⁵⁰ *Id.* at (quoting Fed. R. Evid. 501). See U.S. v. Doe, 429 F.3d 450 (3d Cir. 2005). This exception applies to continuing or future crimes and frauds and not to crimes that occurred in the past. To establish that the communications or materials in question are in furtherance of a fraud or crime, the Government must simply show that the client misuse[d] or intend[ed] to misuse the attorney’s advice in furtherance of an improper purpose.” It cannot simply be evidence of a crime. The client does not have to know that the objective is in fact criminal or fraudulent and the lawyer may be unaware of the client’s purpose. In *Re Grand Jury Subpoena*, 745 F.3d 681 (3d Cir. 2014). Often, the first step to determining whether the crime fraud exception applies is to seek in camera review of the communications. However, *in camera* review may be granted only if the moving party “makes a prima facie showing [interpreted to mean ‘a reasonable basis to believe’] that the client engaged in (or was planning) criminal or fraudulent activity” at the time and the communications were intended by the client “to facilitate or conceal” that activity. U.S. v. Gorski, 807 F.3d 451 (1st Cir. 2015).

⁵¹ U.S. v. Richey, 632 F.3d 559 (9th Cir. 2011) (appraisal work file prepared by counsel not

the communication contains some non-legal information or advice. Some courts hold that the communication is protected where the seeking of legal advice is a “significant” purpose of the communication.⁵² Others hold that the privilege only applies if legal advice is the “primary purpose.”⁵³ The U.S. Supreme Court has refused to resolve the issue,⁵⁴ leaving in-house counsel and others who represent clients in business to wonder whether their communication will ultimately be deemed privileged or not. That sort of uncertainty weakens the protection of the privilege.⁵⁵

II. CHALLENGES OF DIGITALIZATION

In this section we address three current challenges to the attorney client privilege: attorney-client communications generally, and with incarcerated or detained clients in particular; searches of attorneys’ offices and stored information; and virtual proceedings.

A. COMMUNICATIONS

It goes without saying that the idea that lawyers and clients only meet in an office or write letters to each other has gone the way of the horse and buggy. Since the Digital Age, lawyers and clients communicate in many previously unimaginable

privileged or subject to work product privilege where purpose was to prepare a valuation report for the IRS); *U.S. v. Wilson*, 798 F.2d 509, 513 (1st Cir. 1986) (communications for the purpose of negotiating and acting as messenger for a business deal not privileged); *In Re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp.2d 270, 285 (SDNY 2001) (communications among attorneys seeking presidential pardon not privileged since they are acting as lobbyists not attorneys). Notably, a similar limitation also applies in England and Wales. For an interesting discussion as to the scope of attorney-client privilege in that jurisdiction, see *Raiffeisen Bank International AG v. Asia Coal Energy Ventures Ltd.*, *Ashurst LLP* [2019] EWHC 3 (Comm).

⁵² *In Re Kellogg*, 756 F.3d 754, 760 (D.C. Cir. 2014).

⁵³ See, e.g., *In Re Grand Jury*, 23 F.4th 1088 (9th Cir. 2022), *cert. granted*, 143 S.Ct. 80 (2022), *cert. dismissed as improvidently granted*, 143 S.Ct. 543 (2023) (per curiam).

⁵⁴ *Id.*

⁵⁵ Again, a comparison to Spain is revealing. There, the protection of the privilege does not depend on whether the communication is between a client and a lawyer. Indeed, communications between lawyers are subject to professional secrecy and cannot be revealed “unless expressly authorized by the sender and the recipient, or, failing that, the Governing Board [of the relevant bar association]. The Board “may authorize [disclosure] at its discretion for serious reasons and after a reasoned resolution with a hearing of the interested parties.” The privilege protecting communications between lawyers thus belongs to the lawyer, not to the client. In fact, communications between lawyers may not be disclosed to the client unless the provisions of Art. 5 are met. Special rules exist for communication between incarcerated clients and their attorneys. Judges may only order interception of their communications if two requirements are satisfied: (i) the defendant is charged with an offense of terrorism; and (ii) the intervention is authorized by the Prison Authority and approved by the judge on the basis that it is necessary to ascertain the truth of the case. In one case, the examining magistrate who authorized the interception was found guilty of a criminal offense.

ways: email, text, telephone, and fax. Whether these communications are privileged and, if so, whether they have been waived; how to protect them and the consequences of inadvertent disclosure all have become daily issues for lawyers and clients as the dangers of inadvertent waiver have increased. Attorneys also blog, advertise, and post on the internet, including their record in previous cases, where the disclosure of privileged information may occur. Before social media, email and text, inadvertent disclosure was probably less of a problem. However, as technology has enabled lawyers and clients to communicate and share information from anywhere, store it, and access the internet through wifi hotspots, the chance that the communication will somehow be accessible to or sent directly to a third party increases exponentially.

1. England and Wales

Accelerated by the Covid pandemic the exponential use of digital technology has changed the way in which lawyers communicate with their clients,⁵⁶ with a corresponding increase in risk of improper disclosure of privileged material.

For example, in *Curless v Shell International Limited*⁵⁷ Curless was anonymously forwarded an email which contained a privileged conversation between his legal professionals, one external and another seconded to his employer. On appeal from the Employment Appeal Tribunal, the Court of Appeal held that this email contained information that was subject to privilege, and therefore its content could not be relied upon by Curless.⁵⁸ It should, though, be noted that in England and Wales, the content and purpose of the email will determine whether or not it is privileged. The case of *The Civil Aviation Authority v The Queen on the Application of Jet2.com Limited v The Law Society of England and Wales*,⁵⁹ highlights the risks to legal professional privilege when emails are sent to multiple recipients for example for the purpose of obtaining views from a range of experts. While the ability to do so is a key advantage of email, a document will not be privileged, where the *dominant purpose* of that email is anything other than the seeking of legal advice.⁶⁰ The risk of disclosure of privileged material⁶¹ can be exacerbated by the inadvertent use of the “Reply all” button and other digital communications carry similar risks. Instant messaging services, such as Whatsapp,⁶² are, of course, not unique in their

⁵⁶ Which are becoming increasingly common in the context of residential conveyancing. See e.g., MORR & CO., OUR APP, <https://www.morrlaw.com/property-individuals/conveyancing-app/> (last visited Feb. 19, 2024).

⁵⁷ Michael Curless v. Shell Int’l Ltd. [2019] EWCA (Civ.) 1710. See also, The Financial Reporting Council Ltd v. Frasers Group Plc (formerly Sports Direct International Plc [2020] EWHC 2607 (Ch).

⁵⁸ Michael Curless v. Shell Int’l Ltd. [2019] EWCA (Civ.) 1710 ¶ 52.

⁵⁹ The Civil Aviation Authority v The Queen on the Application of Jet2.com Limited v The Law Society of England and Wales [2020] EWCA (Civ.) 35 [94] [CAA v. Jet2]. This case also indicates that the email and each attachment shall be subject to separate consideration as to whether each document is covered by legal professional privilege ¶ 108.

⁶⁰ *Id.* at 100(vi) and 102.

⁶¹ See *supra* note 40, the discussion pertaining to R. v. G [2004] EWCA (Crim) 1368 for the consequences of such a disclosure.

⁶² See Tatiana Akhmedova v. Farkhad Teimur Akhmedov [2019] EWHC 3140 (Fam.) ¶ 28.

ability to provide instantaneous communication between lawyers and their clients, but they all present a risk of the inadvertent disclosure of information either by unsecure connections or by including such information in messages that do not fall within the scope of privilege, e.g., where the “dominant purpose” of that message was, for example, for commercial reasons. Accordingly, the Court recognized in *R on the application of BG v London Borough of Hackney*⁶³ that searches of social media accounts risk the recovery of information protected by legal professional privilege.⁶⁴ Lawyers should pay heed to this and avoid communicating with their clients through social media, not least as a search of social media accounts is a growing practice in the investigation of criminal offences.

In the context of this Article, a matter of particular relevance is the interception of communications as part of an investigation. This issue has arguably existed for some time, as highlighted in *Re McE*,⁶⁵ in which Lord Phillips of Worth Matravers noted that the case involved dealing with the tensions arising “between the importance of covert surveillance in the fight against terrorism and serious crime and the importance of LPP”.⁶⁶ Lord Phillips emphasized in that case, that it is not the lawfulness of the surveillance that is the issue but rather the use to which that information is put. For example, where information gathered is used to prevent serious crime rather than prosecute it, no question of legal professional privilege arises.⁶⁷ The existence of the privilege does not, in itself, give rise to a right to the private consultation of a client with their lawyer⁶⁸ and, as such, the surveillance of communications between an individual and their lawyer is not precluded purely on the basis that some content might be covered by privilege. In fact, the Regulation of Investigatory Powers Act 2000 (RIPA) authorizes surveillance of communications that might contain privileged material.⁶⁹ Lord Phillips suggests the existence of two tiers of LPP in this context: RIPA can be used to override privilege at common law but cannot be used to circumvent the statutory right to privately consult a lawyer whilst detained.⁷⁰ However, the majority of the House of Lords in this case found that such a distinction did not exist, and that RIPA surveillance authorizations could enable lawful surveillance of discussions between lawyers and their clients, notwithstanding the risk of hearing/recording privileged conversations.⁷¹

While from a civil liberty, perhaps even ethical perspective, this might appear to be a significant validation of the use of tactics by law enforcement agencies which undermine the core rationale of legal professional privilege, the court in *Re McE*, was clear in stating that legal professional privilege does not necessarily prevent the conversation between lawyer and client being subject to surveillance/being overheard. Rather, it applies restrictions on how that material can be used in proceedings against the accused.⁷²

⁶³ [2022] UKUT 00338.

⁶⁴ *Id.* at 64.

⁶⁵ *Re McE* [2009] UKHL 15.

⁶⁶ *Id.* at 10.

⁶⁷ *Id.* at 14.

⁶⁸ *Id.* at 24.

⁶⁹ *Id.* at 33.

⁷⁰ *Id.* at 41.

⁷¹ *Id.* at 41 and 105 respectively.

⁷² See RICHARD GLOVER, MURPHY ON EVIDENCE 701 (15th ed., Oxford Univ. Press 2021).

2. The United States

Much that has been said above about new methods of potentially insecure attorney-client communications in England and Wales applies in the United States. First, email can be easily intercepted. Second, email can be transmitted widely, either inadvertently⁷³ or intentionally, compromising the confidentiality of the information.⁷⁴ Nevertheless, in the U.S. courts, email is generally considered to be no less secure than other forms of communication both legally and ethically, because the participants have a reasonable expectation of privacy.⁷⁵ That is, information sent over the internet generally receives protection of the attorney-client privilege⁷⁶ where disclosure is inadvertent, the attorney has taken “reasonable efforts” to prevent inadvertent or unauthorized access, and acts promptly to remedy the problem.⁷⁷ Generic notices are a good practice to protect the confidentiality and privileged status of a communication, and the absence of such a notice may lead to a finding that the sending attorney did not take reasonable steps to prevent disclosure.⁷⁸ Password-protected devices and documents and the use of encryption

⁷³ See e.g., *Multiquip, Inc. v. Water Mgmt. Sys. LLC*, No. CV 08-403-S-EJL-REB, 2009 WL 4261214 at *4-5 (D. Idaho, Nov. 23, 2009) (stating email’s auto-fill feature caused privileged documents to be sent inadvertently to opposing counsel); *Muro v. Target Corp.*, 243 F.R.D. 301, 307-10 (N.D. Ill. 2007) (stating emails sent to more than ten employees or to unidentified distribution lists denied privileged status), *rev’d in part on other ground*, 250 F. RD 350 (N.D. Ill. 2007).

⁷⁴ ABA Comm’n on Ethics & Prof’l Responsibility “Formal Opinion 99-477R (1999) (revised May 22 2017).

⁷⁵ *Curto v. Med World Commc’ns Inc.*, No. 03-CV-6327, 2006 WL 1318387 (E.D.N.Y. May 15, 2006).

⁷⁶ See e.g., *McCook Metals LLC v. Alcoa, Inc.*, 192 F.R.D. 242, 255 (N.D. Ill. 2000); Cal. Evid. Code § 952 (West 2009) (stating communication between client and lawyer is privileged even though transmitted through electronic means).

⁷⁷ As to inadvertent disclosure, MR 404(b) requires as a matter of ethics, that a lawyer who “knows or reasonably should know” that a “document or electronically stored information” was inadvertently sent must “promptly notify” the sender. As a matter of evidence law, FRE 502 (a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver provides:

“When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).”

⁷⁸ See *Clarke v. JP Morgan Chase & Co*, No. 08-CV-2400, 2009 WL 970940 (S.D.N.Y. Apr. 10, 2009) (counsel did not take reasonable steps to prevent disclosure of email where, inter alia, the email did not contain any notice that the email contained privileged information).

tools can also protect privileged communications.⁷⁹ It is clear that counsel has an ethical duty to advise a client about the risks presented by using technology, including e-mail, especially if a client's emails are subject to review by a third party like an employer.⁸⁰

As in England and Wales, "cc-ing" an attorney on an otherwise non-privileged communication does not automatically protect the communication.⁸¹ Whether "cc-ing" or "bcc-ing" a client on an email to other lawyers renders the communication privileged has generated some controversy and ethical concern, particularly because 1) it reveals the client's contact information; 2) may imply a willingness to have other counsel contact the client directly; and 3) a client may "reply all" and inadvertently reveal confidential information.⁸² These risks can be avoided simply by forwarding an email sent to counsel to the client. Moreover, most courts have held that an attachment that is not itself privileged when created is not within the privilege if attached to a privileged email.⁸³ Courts that have held to the contrary identify the act of sending the email (with the attachment) as the privileged communication.⁸⁴

An inmate's right to speak confidentially with counsel during a legal proceeding is a fundamental right.⁸⁵ Inmates generally have a right to private communications with their attorneys in person⁸⁶ and by properly-marked, attorney-client mail.⁸⁷ As to legal phone communications, calls can be recorded so long as prisons provide a warning that calls will be monitored.⁸⁸ Nevertheless, the same protection has not been applied to otherwise privileged emails: the Federal Bureau of Prisons monitors prisoner/counsel emails and makes them available to prosecutors on request.⁸⁹

⁷⁹ See Fed. R. Evid. 502; MODEL RULES OF PRO. CONDUCT r.4.2 (AM. BAR ASS'N 1983) (requiring a lawyer who receives a communication that they reasonably believe was inadvertently sent to inform the attorney sender). Several courts have imposed sanctions in these circumstances.

⁸⁰ ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011).

⁸¹ Willnerd v. Sybase, Inc., No. 1:09-CV-500-BLW, 2010 WL 5391270 (D. Idaho Dec. 22, 2010).

⁸² Ass'n of the Bar of the City of N.Y. Comm. on Pro. Ethics, Formal Op. 2022-3 (2022).

⁸³ Doe v. Intermountain Health Care, Inc, No. 2:18-CV-807-RJS-JCB, 2021 WL 151090 (D. Utah, Jan. 16, 2021), *relying on*, Fisher v. U.S., 425 U.S. 391 (1976).

⁸⁴ See e.g., Willis Elec. Co. v. Polygroup Trading Ltd., No. 15-cv-343-WMW-KMM, 2021 WL 568454 (D. Minn. Feb. 16, 2021).

⁸⁵ An employee's use of their employer's email system waives the privilege has been addressed by several courts. In the main, the answer relies on whether the client has a reasonable expectation of privacy in the communications. Several criteria address this question: does the corporation maintain a privacy banning personal or other use; does it monitor the use of the employee's computer or email do third parties have a right of access to the computer or emails and was the employee aware of these monitoring policies. Coplon v. U.S., 191 F.2d 749, 758-59 (D.C. Cir. 1951).

⁸⁶ See Johnson-El v. Schoemehl, 878 F.2d 1043, 1052-53 (8th Cir. 1989); Black v. U.S., 385 U.S. 26 (1966); Mastrian v. McManus, 554 F.2d 813, 820-21 (8th Cir. 1977).

⁸⁷ See e.g., Nordstrom v. Ryan, 762 F.3d 903, 911 (9th Cir. 2014).

⁸⁸ See e.g., U.S. v. Novak, 531 F.3d 99 (1st Cir. 2008); U.S. v. Lentz, 419 F.Supp.2d 820 (E.D. Va. 2005).

⁸⁹ NATION'L ASSOCIATION OF CRIMINAL DEFENCE LAWYERS: FOURTH AMEND CTR, PRESERVING INCARCERATED PERSONS' ATTORNEY-CLIENT PRIVILEGE IN THE 21ST CENTURY: WHY THE FEDERAL BUREAU OF PRISONS MUST STOP MONITORING CONFIDENTIAL LEGAL EMAILS (2020), <https://www.nacdl.org/Document/PreservingIncarceratedPersonsAttyClientPrivilege>.

Generally, this is accomplished by requiring an inmate to waive the privilege as a condition to using the prison email system.⁹⁰ Messages must be limited to 13,000 characters and no attachments or images can be transmitted. Incarcerated persons are charged by the minute for computer time and for each message they send. Prisoners are required to “voluntarily” agree to monitoring and waiver of the attorney client privilege. Under the TRULINCS system used in federal prisons, users must enter the recipient’s email address in their account and request approval of the contact by the warden. Once approved, the system sends an email to the recipient prompting them to create an account on Corrlinks. Then the recipient will become an approved contact. Users may not send images or attachments and messages are limited to 13,000 characters.⁹¹ Moreover, under BOP policy, law enforcement and prosecutors can receive all of an incarcerated person’s email communications, including emails with their lawyers simply by requesting them.⁹²

Emails are particularly important to the right to counsel for prisoners, given the difficulty of arranging for unmonitored personal visits and unmonitored telephone calls. They are also important for lawyers because they are more convenient, allow for a written version of a conversation, and can be saved and accessed.⁹³ The traditional justification for monitoring attorney-client communications – that attorneys will be used to smuggle contraband or facilitate illegal acts – is largely unfounded given that email is a purely digital medium, examples of attorneys facilitating unlawful behavior in any medium are extremely rare, and through email the attorney does not need to be present at the institution and thus is less likely to bring any contraband.⁹⁴

Although not necessarily a new practice, recording of prisoner/counsel telephone calls is widespread based largely on the assertion that there is a recorded warning to the caller that the call is not protected.⁹⁵ These recordings are then shared with prosecutors.⁹⁶ A recently proposed Maine statute would require the state to maintain a register of attorneys representing incarcerated individuals. Any calls to or from those numbers would automatically be considered privileged and any intercepted attorney client communications would be inadmissible in criminal proceedings. Any official who participated in intercepting such a communication would be disqualified from participating in criminal proceedings involving the

⁹⁰ *Id.* at 8.

⁹¹ *Id.* at 10.

⁹² *Id.* at 22; U.S. v. Fumo, 655 F.3d 288 (3d Cir. 2011) *as amended*, Sept. 15, 2011.

⁹³ Amelia H. Barry, *Inmates’ E-mail with Their Attorneys: Off-limits for the Government?*, 64 CATH. U. L. REV. 753, 765 (2015).

⁹⁴ Given the intrusion on the privilege that monitoring emails presents, The Effective Assistance of Counsel in the Digital Era Act would prohibit the government from monitoring emails between incarcerated persons and their attorneys, with narrow exceptions. Prosecutors would be required to follow the same sort of procedure to get access to such emails as they are required to do with emails from non-incarcerated persons. The Bill, introduced in 2021, passed the house but has been referred to the Judiciary Committee in the Senate.

⁹⁵ See Douglas Ankney, *Attorney-Client Privilege Under Attack in Jails Across the Nation*, PRISON LEGAL NEWS (May 2, 2019), <https://www.prisonlegalnews.org/news/2019/may/2/attorney-client-privilege-under-attack-jails-across-nation/> (citing US jurisdictions that engage in this practice).

⁹⁶ *Id.*

defendant if they had been given notice that the defendant was on the phone with their attorney.

Finally, many lawyers have adopted the practice of blogging either on their own or in response to another's blog. Indeed, lawyers frequently comment on legal topics on social media, in blogs, online articles, website postings and the like. They also comment on their own successes and professional experiences. Lawyers have an ethical obligation to protect confidential information when they do so.⁹⁷ The same is clearly true for privileged communications.

B. SEARCHES OF LAW OFFICES AND STORED DIGITAL INFORMATION

When an attorney's office is searched, privileged information is certain to be present. In this age of computers the concern is no longer protecting the contents of a filing cabinet or desk but rather protecting computer data not only found locally on a lawyer's computer but also on a variety of outside servers, like "the cloud," located all over the world. The risk that some privileged information may be revealed is a real one. There are two main issues: the risk of disclosure of privileged information in a search of a lawyer's office, where huge volumes of information may be digitally stored relating to many clients; and the disclosure, through inadvertence, hacking or otherwise, from outside servers. Huge volumes of information may be digitally stored.⁹⁸

1. England and Wales

At the outset, it is notable that a search of a suspect's premises might lead to the recovery of items which contain privileged material that may render the search warrant unlawful. To avoid that result, law enforcement agencies must establish there exist reasonable grounds for believing that legally privileged or excluded material would not be found in the property to be seized, often a computer.⁹⁹ Where a warrant appears to authorize the seizure of privileged material, this warrant runs the risk of being quashed.¹⁰⁰ However, the extent to which this protects privileged material can be questioned. For example, In *R. (A and another) v Central Criminal Court and another*¹⁰¹ claimants sought the judicial review of a court's decision to grant a search warrant for the search and seizure of cellular phones which they considered might contain information subject to legal professional privilege. The claimants contended that, rather than authorizing the seizure of the cellular devices, the warrant should have instead focused on material which might be found

⁹⁷ MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983); ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 18-480 (2018).

⁹⁸ For an interesting and thorough comparative view of law office search protocols in the UK, US and New Zealand, see Rebecca Mitchell, Micheal Stockdale & Francis A. Gilligan, *The Search and Seizure of Digital Materials Under Warrant and Protecting Privilege: Comparative Analysis and Recommendations for Best Practice*, 88 J. OF CRIM L. 83 (2024).

⁹⁹ *R. (A & another) v. Central Criminal Court & another* [2017] EWHC 70 (Admin) (Eng.).

¹⁰⁰ *R. (On the Application of S, F & L) v. Chief Constable of the British Transport Police, The Southwark Crown Court* [2013] EWHC (Admin) 2189 (Eng.).

¹⁰¹ [2017] EWHC 70 (Admin) (Eng.).

on the devices and respective SIM cards. This argument was rejected, the court relying on the earlier decision in *R. (on the application of H) v Inland Revenue Commissioners*,¹⁰² to the effect that the possibility that incriminating files might be found on a hard disk would be sufficient to justify the seizure of the computer in question notwithstanding the fact that there might also be material on that computer which would be irrelevant to the investigation. In this case, the judge noted the parallels with a filing cabinet (where individual files can be removed and seized, leaving the remainder behind) and a hard disk which is a single object, as opposed to a “container of files”.¹⁰³ In essence, the computer is the item to which a search warrant relates, not the information (or specific pieces of information) stored on it, so that authorizing the seizure of a computer or hard disk can be a proportionate measure, notwithstanding the fact that the computer is likely to contain a great deal of information which is irrelevant to an investigation.

Arguably, the same can be said for mobile phones and seemingly other electronic devices used to store data, even if these are not specified on a warrant.¹⁰⁴ Indeed, in the execution of a warrant, investigators can, whilst lawfully on premises, seize any item for which they have reasonable grounds to believe they are authorized to seize, notwithstanding the fact that these may not, for example, be expressly set out in the warrant under which they lawfully entered and searched a property.¹⁰⁵ This includes items which might also contain information which is subject to legal professional privilege, where this cannot be separated at the scene of the search.¹⁰⁶ In this context, the digital era brings with it, an increased risk of the seizure of material will contain material which is privileged.¹⁰⁷

“Most documentary evidence nowadays exists in digital form stored either in digital devices or in cloud storage. The relevance of this transformation to search orders has been insufficiently appreciated”.¹⁰⁸ Thus, in *R. (On the Application of S, F and L) v Chief Constable of the British Transport Police, and The Southwark Crown Court*,¹⁰⁹ the court upheld the search of the home of a solicitor who was accused of perverting the course of justice, as well as two law firm offices. The solicitor (S) and two firms of solicitors (F and L) applied (by way of judicial review) to have search warrants pertaining to both residential and commercial property quashed. In relation to the solicitor’s home, a warrant to search had been applied for after he was caught trying to leave the police station with a client’s mobile

¹⁰² [2002] EWHC 2164 (Admin) (Eng.).

¹⁰³ *R. (on the application of H) v. Inland Revenue Commissioners* [2002] EWHC 2164 (Admin) ¶ 37. The High Court has accepted the notion that a hard disk constitutes a document for the purposes of warrants issued under the VAT Act 1994. See *R. (on the application of Paul Da Costa & Co v. Thames Valley Magistrates Court* [2002] EWHC 40 (Admin) ¶ 20 (Eng.).

¹⁰⁴ *R. (A & another) v. Central Criminal Court & another* [2017] EWHC 70 (Admin) ¶ 36 – 41.

¹⁰⁵ Criminal Justice and Police Act 2001, §50(1) (UK).

¹⁰⁶ Criminal Justice and Police Act 2001, §.50(2) (UK). *R. (A & another) v. Cent. Crim. Ct. & another*, [2017] EWHC 70 (Admin) ¶¶ 36 – 41.

¹⁰⁷ *See Case 28/62, Da Costa en Schaake NV v. Nederlandse Belastingadministratie*, 1963 E.C.R. 31 (ECJ). (in which this point was made regarding an accountancy firm, who were the subject of an investigation, and data pertaining to its clients, who were not).

¹⁰⁸ *TBD (Owen Holland) Ltd. v. Andrew Simons and Others*, [2020] EWCA (Civ) 1182, ¶ 176.

¹⁰⁹ [2013] EWHC 2189 (Admin) (Eng.).

telephone. The police also searched the premises of a law firm at which the solicitor worked, and that of another solicitor who took over the representation of the client when the first solicitor was arrested for perverting the course of justice. In this case, an independent member of the Bar of England and Wales was asked to review the documentation in the absence of investigators, and to re-seal any material which he deemed to be subject to legal professional privilege and pass on any material relevant to the investigation to the police.

Search and seizure of lawyers' digital property involves balancing the importance of the investigation to which the search and seizure relates and the severe professional disruption caused by doing so, including a potential breach of privilege.¹¹⁰ One mechanism that might be used to reduce the disruption to lawyers' professional practice caused by the seizure of evidence, is greater use of digital imaging of the device from which the material is to be seized (sometimes referred to as "cloning"). Known in civil contexts as an Imaging Order,¹¹¹ this, in effect, takes a copy of the device at the time at which it is "seized". From a professional perspective, there are clear advantages to this approach, not least as the lawyer will retain their files and information pertaining to their practice, which is particularly important in relation to the obligations they bear to other clients. However, in the context of legal professional privilege, such an order is not without its issues. Indeed, such an order appears to allow an image of an entire device to be taken, with no regard as to whether this might also include information which is subject to legal professional privilege.¹¹²

In a similar vein to that outlined, it is the case that investigating authorities can seize digital devices in their entirety which *might* contain evidence of criminal wrongdoing. For example, a warrant to search premises and seize items issued under s.23(3) Misuse of Drugs Act 1971,¹¹³ can authorize officers to seize documents pertaining to the illicit distribution of drugs.¹¹⁴ The application form pertaining to such a warrant, clearly states that electronic devices which contain such documents fall within its scope.¹¹⁵ The form requires specific information concerning the way in which such documents are sifted,¹¹⁶ thereby ensuring that investigators are mindful of their obligations to preserve privilege and guarding against the observation of privileged material by investigators.

In *R (on the application of Colin McKenzie) v Director of the Serious Fraud Office* the issue of who should manage and conduct the sift was considered.¹¹⁷ The

¹¹⁰ *R. (S, F & L) v. Chief Constable of the Brit. Transp. Police & Southwark Crown Ct.* [2013] EWHC 2189 (Admin) (Eng.).

¹¹¹ *TBD (Owen Holland) Ltd. v. Andrew Simons and Others*, [2020] EWCA (Civ) 1182. (Eng.) (There appears to be no equivalent in criminal procedure).

¹¹² *Id.* at 178. (Arnold LJ also notes that Imaging Orders also that an inability to differentiate between relevant and irrelevant material is a key disadvantage of such orders).

¹¹³ Misuse of Drugs Act 1971, § 23(3) (UK).

¹¹⁴ Misuse of Drugs Act 1971, § 23(3)(b) (UK).

¹¹⁵ *But see* GOV.uk, *Application for Search Warrant* available at <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fmedia%2F617674048fa8f529777ffcaf%2Ffiw029-eng.docx&wdOrigin=BROWSELINK> (last visited Dec. 13, 2023), at question 3.

¹¹⁶ *Id.* at question 3(c).

¹¹⁷ *R. (McKenzie) v. Dir. of the Serious Fraud Off.*, [2016] EWHC 102 (Admin) (Eng.).

use of internal IT staff at the Serious Fraud Office¹¹⁸ was challenged on the basis that the prevailing Attorney General’s guidance required sifting activities to be undertaken by independent third parties.¹¹⁹ This argument was dismissed by the court, on the basis that the SFO’s policies and systems for handling such material, accorded with the guidelines and were sufficiently robust to prevent potential misuse.¹²⁰ As the court noted, legislating and regulating against a deliberate breach of legal professional privilege is always going to be problematic.¹²¹ A significant factor that weighed with the court was the fact that the SFO’s internal processes existed to quarantine material suspected of being privileged, so that it could be reviewed by an independent lawyer. This was the approach taken in *R. (On the Application of S, F and L) v Chief Constable of the British Transport Police*¹²²

2. The United States

Special problems arise when the government searches an attorney’s office, whether for information relating to the attorney’s culpability or the culpability of the attorney’s client – either or both could be the target. Privileged materials are bound to be present. Today, as noted above in relation to England and Wales, the fact that an attorney may have huge digital files containing volumes of materials - both for a client who is a suspect but also for all of the other clients – also places the attorney-client privilege in particular jeopardy in the US context.

The “search of law offices is not per se unreasonable...the correct approach is not to immunize offices from searches...but to scrutinize carefully particularity and breadth of warrant authorizing search, nature and scope of search, and any resulting seizure.”¹²³ Thus, as with all search warrants, a warrant to search an attorney’s office

¹¹⁸ *Id.* [hereinafter SFO]

¹¹⁹ *R. (on the application of Colin McKenzie) v. Director of the Serious Fraud Office* [2016] EWHC 102 (Admin) ¶ 1 (Eng.).

¹²⁰ *Id.* at ¶ 37.

¹²¹ R. Mitchell, M. Stockdale & F.A. Gilligan, *The Search and Seizure of Digital Materials Under Warrant and Protecting Privilege: Comparative Analysis and Recommendations for Best Practice*, 88 J. OF CRIM. L. 83, 90 (2024) (citing *R. (on the application of Colin McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin) ¶ 34).

¹²² SFO ¶ 41 (In the United States, MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N 1983) (“Special Responsibilities of a Prosecutor”) section (e) provides that a prosecutor should not “subpoena a lawyer into the grand jury or other criminal proceedings” unless they “reasonably believe[s]” the information is not privileged, the evidence is essential to successfully complete an ongoing investigation, and there is “no other feasible alternative to obtain the information.” While addressed to the practice of subpoenaing defense counsel, it might be argued that it reflects an obligation on the prosecution not to invade the attorney-client privilege).

¹²³ *Klitzman v. Krut*, 744 F.2d 955, 959 (3d Cir. 1984). (The *Klitzman* court held that if the government is requesting materials from a law firm, that firm should have the right to provide the documents voluntarily. If the firm declines, then the court should institute a “workable procedure” which accommodates the needs of the investigating authorities, third parties with no connection to the investigation, and also interests protected by the work product doctrine. It may be necessary to include the actual device sought to be searched, rather than simply the premises, and even the specific information sought to be seized within the specific device or devices. See Rebecca Mitchell, Michael Stockdale & Francis A. Gilligan, *The Search and Seizure of Digital Materials under Warrant and*

requires a showing of probable cause before a court. Specifically with respect to searches where there may be privileged materials, however, 28 .F.R §59.4(b),¹²⁴ “[A] search warrant should not be used to obtain documentary materials believed to be in possession of a disinterested third party...lawyer...under circumstances in which the materials sought, or other materials likely to be reviewed during the execution of the warrant, contain confidential information...” unless several circumstances are satisfied.¹²⁵ First, it must be demonstrated that “use of a subpoena, summons, request or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought.” Second, access to the documentary material must be of “substantial importance to the investigation or prosecution for which they are sought.” Finally, the application for the warrant must have been properly approved.¹²⁶

The United States Department of Justice (DOJ) maintains the Justice Manual, which is a compilation of rules or best practices for law enforcement throughout the country. Section 9-19.220, adopts 28 CFR 59.4(b)¹²⁷ It further states that, “[A] search warrant should normally not be used to obtain such confidential materials.”¹²⁸ Less intrusive measures such as requests and subpoenas are preferred over search warrants unless utilizing less intrusive measures “would substantially jeopardize the availability or usefulness of the materials sought” and “access to the materials is of substantial importance to the investigation or prosecution for which they are sought[.]”¹²⁹ If both requirements are satisfied, then a warrant must be approved by a Deputy Assistant Attorney General (DAAG) “upon the recommendation of the United States Attorney.”¹³⁰ There is an emergency exception in instances “where there is an immediate need to seize the material and not enough time to secure DAAG approval...the application may be authorized by the United States Attorney,”¹³¹ but that exception does not apply to law offices.¹³² According to

Protecting Privilege: Comparative Analysis and Recommendations for Best Practice 88 J. CRIM. L. 83 (2024)).

¹²⁴ 28 CFR §59.4(b).

¹²⁵ 28 CFR §59.4(b)(1). (“The term *disinterested third party* means a person or organization not reasonably believed to be (1) A suspect in the criminal offense to which the materials sought under these guidelines relate; or (2) Related by blood or marriage to such a suspect” 28 CFR §59.2(b). “The term *documentary materials* means any materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, films or negatives, audio or video tapes, or materials upon which information is electronically or magnetically recorded, *but does not include* materials which constitute contraband, the fruits or instrumentalities of a crime, or things otherwise criminally possessed.” 28 CFR §59.2(c)).

¹²⁶ *Id.* (28 CFR §59.4(b)(2) states that application must be upon the recommendation of the U.S. Attorney (or in certain circumstances appropriate supervisory official of the Department of Justice) and ordinarily approved by a Deputy Assistant Attorney General absent exigent circumstances).

¹²⁷ JUSTICE MANUAL §9-19.220 (U.S. DEP’T OF JUST. 2018).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* (may be upon recommendation of a supervising department of Justice Attorney in cases in which a division department is directing handling the investigation or prosecution.)

¹³¹ *Id.*

¹³² But *c.f.* JUSTICE MANUAL (U.S. DEPT’ OF JUST. 2018). *Id.*

the Special Matters Unit created by the Fraud Section of the Criminal Division of the DOJ as an in-house filter team, “when a search warrant is sought relating to an attorney’s office it should be accompanied by a “Filter Protocol,” describing the intended procedures for protecting privileged materials: such a filter protocol should describe the entity that will be responsible for reviewing seized materials and the procedures (for example, search words) that will be used to sift the seized materials”.¹³³

Once a search warrant has been issued, the problem becomes protecting materials that are privileged.¹³⁴ The DOJ Manual provides three different methods of protecting privileged materials under the circumstances.¹³⁵ The option most often requested by the prosecution is to engage a “taint team” or “filter team,” that is, a group of prosecutors from the same office conducting the search but who are not involved in the specific investigation.¹³⁶ Federal district courts are split on the use of government taint teams in criminal proceedings.¹³⁷ While some courts believe that “[t]he use of a taint team is a proper, fair and acceptable method of protecting privileged communications ...,” others insist that “reliance on the implementation of a [taint team], especially in the context of a criminal prosecution, is highly questionable, and should be discouraged.”¹³⁸

Taint teams seem to be approved where the government has already obtained the information and where the lawfulness of the acquisition of the documents to be reviewed has not been challenged.¹³⁹ Courts also appear to be more willing

¹³³ *But see* L.V. Ciko Torza & T.J. Coley, *The Special Masters Unit: Best Practices for Addressing Attorney-Client Privilege Issues* 70 DEP’T OF JUST. J. OF FED. L. & PRAC. 29, 34-5 (2022).

¹³⁴ *But see* In Re Grand Jury Subpoenas (04-124-03 & 04-124-05), 454 F.3d 511, 522 (6th Cir. 2006).

¹³⁵ JUSTICE MANUAL §9-13.420 (U.S. DEP’T OF JUST. 2018) (The three different modalities are use of a privilege team, in camera review by a judicial officer, or a court-appointed special master).

¹³⁶ In Re Grand Jury Subpoenas (04-124-03 & 04-124-05), 454 F.3d 511, 522 (6th Cir. 2006)., U.S. v. Abbell, 914 F. Supp. 519 (S.D. Fla. 1995). (Note: Taint teams are also referred to as Filter teams, *See* U.S. v. Under Seal (In re Search Warrant Issued June 13, 2019), 942 F.3d 159 (4th Cir. 2019)).

¹³⁷ *But see Id.* at 140.; In re Search Warrant Issued June 13, 2019, 942 F.3d 159 (4th Cir. 2019) (approving of taint teams but requiring that when they are used “exacting requirements” must be specified and enforced and were inadequate); In re Sealed Search Warrant & Application for a Warrant by Telephone or Other Reliable Elec. Means, 11 F.4th 1235 (11th Cir. 2021) (same, but finding procedures were sufficient to protect the privilege). Other courts have simply appointed a special master rather than rely on the prosecution’s taint team. *See* Cohen v. U.S., No. 1:18-mj-03161, 2018 WL 1772209 (S.D.N.Y. Apr. 13, 2018)., ECF No. 6 at 4, 25; U.S. v. Seal (In re Search Warrant Issued June 13, 2019), 942 F.3d 159, 179 (4th Cir. 2019).; U.S. v. Stewart, No. 02 Cr. 395, 2002 WL 1300059 (S.D.N.Y. June 11, 2002).

¹³⁸ *But see* U.S. v. Crim Triumph Cap. Grp., 211 F.R.D. 31, 43 (D.Conn.2002); *See* In re Search Warrant for Law Offices Executed on March 19, 1992, 153 F.R.D. 55, 59 (S.D.N.Y.1994). (Again, drawing lessons from other jurisdictions, it should be noted that the European Court of Human Rights has repeatedly made clear that not only must the lawyer be present but there must also be present a representative of the local bar association or a delegate, and that the person present must be skilled in identifying protected material).

¹³⁹ *See e.g.*, In Re Grand Jury Subpoenas (04-124-03 and 04-124-05), 454 F.3d 511, 522-23 (6th Cir.2006) (citing Abbell, 914 F.Supp. 519); U.S. v. Neill, 952 F.Supp. 834,

to approve the use of government taint teams when there is a larger amount of information at issue,¹⁴⁰ possibly for cost reasons, or where there is a need for speed.¹⁴¹

Some courts, however, have recognized that the “appearance of fairness” may require an objective reviewer rather than a prosecution taint team.¹⁴² Thus, as in the United Kingdom, the use of teams from a prosecution office has been challenged. For example, in *United States v. Under Seal (In re Search Warrant Issued June 13, 2019)*,¹⁴³ the procedures used were held to be inadequate, where the judge decided ex parte that confiscated materials would be reviewed by a filter team and set forth rules for the team’s review.¹⁴⁴ The team was to be comprised of “lawyers from the United States Attorney’s Office,...a legal assistant,...a paralegal,...agents of the IRS and DEA[,] and forensic examiners.,”¹⁴⁵ who were not involved with the pertinent investigation.¹⁴⁶ On appeal, the court disapproved of the process of allowing the team to review the documents and forward documents directly to the prosecution that it determined to be nonprivileged.¹⁴⁷ For materials that were privileged and redactable or potentially privileged, the team was to seek an agreement with counsel as to which should be forwarded to the prosecution team. If there was a disagreement such items would be submitted to the court.”¹⁴⁸ The court held that the district court erred in “fail[ing] to recognize that an adverse party’s review of privileged materials seriously injures the privilege holder,” and should not have delegated the judicial function of determining privilege to the taint team.”¹⁴⁹

United States v. Cohen,¹⁵⁰ provides a good example of the kinds of procedures that have been approved. There, adversarial proceedings took place four days after material was seized but before their review by the filter team. Instead of authorizing the filter team, the court appointed a special master. As a result, no seized items were reviewed by the executive branch before a privilege review was conducted.

837 n.4 (D.D.C.1997) (noting “[n]o litigation directly resulted from the taint team’s review because the defendants never filed any motions for a protective order”); *U.S. v. Winters*, No. 06-cr-54, 2006 WL 2789864, at *2 (S.D.N.Y. Sept. 27, 2006)(same).

¹⁴⁰ *U.S. v. Jackson*, No. 07-0035, 2007 WL 3230140 (D.D.C. Oct. 30, 2007). (quoting *In re Grand Jury Subpoenas*); *Hicks v. Bush*, 452 F.Supp.2d 88, 103 FN 12 (D.D.C.2006).; *U.S. v. Grant*, No. 04-cr-207, 2004 WL 1171258, at 3 (S.D.N.Y. May 25, 2004).

¹⁴¹ *Jackson*, 2007 WL 3230140 at 5-6.

¹⁴² *But see* Neill, 952 F. Supp. 841 FN 14. (“[T]here is no doubt that, at the very least, the ‘taint team’ procedures create an appearance of unfairness.”); *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. at 59 (it is a great leap of faith to expect that members of the general public would believe that a government taint team can be objective). *See also* *U.S. v. Johnson*, 362 F. Supp. 2d 1043, 1084 (N.D. Iowa 2005) (explicitly limiting contact between outside prosecution taint team and prosecutors).

¹⁴³ *But see* *Under Seal (In re Search Warrant Issued June 13, 2019)*, 942 F.3d.

¹⁴⁴ *But see id.* at 164.

¹⁴⁵ *Id.* at 165.

¹⁴⁶ *Id.*

¹⁴⁷ *U.S. v. Under Seal (In re Search Warrant Issued June 13, 2019)*, 942 F.3d 159, 166 (4th Cir. 2019).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Cohen v. U.S.*, No. 1:18-mj-03161, 2018 WL 1772209 (S.D.N.Y. Apr. 13, 2018) ECF No. 6.

Relevant clients were allowed to intervene and participate in the privilege review process so they could mark materials privileged or “highly personal.” Items not so marked were provided to the executive branch and the others were reviewed by the special master who regularly conferred with the lawyer and relevant clients. The special master provided written reports and recommendations to the court and the lawyer and relevant clients had an opportunity to object. The court then conducted an independent review of the reports, recommendations and documents before issuing rulings on privilege.¹⁵¹

Finally, at least one court has denied a motion to dismiss where a taint team was employed and had viewed privileged materials, in the absence of evidence that the government’s conduct was intentional or “manifestly and avowedly corrupt”¹⁵² or that defendant had been prejudiced by the disclosures.¹⁵³

Other courts have granted a defendant’s motion to appoint a special master rather than rely on the prosecution’s taint team procedures. For example, in *United States v. Stewart*,¹⁵⁴ the government had searched offices of the defendant, a criminal defense lawyer, in a suite shared by her and four other criminal defense attorneys and had seized some computerized information about clients unrelated to the case. Given the defendant’s status as a criminal defense attorney, the seizure of materials from other criminal defense attorneys who shared office space with the attorney, and the likelihood that privileged materials being seized from criminal defense attorneys involving other clients, the court granted the defendant’s motion to appoint a special master.¹⁵⁵

As to storage issues, as is the rule with respect to communications generally, a lawyer acts ethically in using an external storage facility if reasonable steps are taken to protect the client’s information. Other steps include ensuring that the storage provider has an enforceable obligation to preserve confidentiality and security and investigating its security measures and policies before storing privileged information there.¹⁵⁶

¹⁵¹ *Id.* See discussion in Rebecca Mitchell, Michael Stockdale & Francis A. Gilligan, *The Search and Seizure of Digital Materials Under Warrant and Protecting Privilege: Comparative Analysis and Recommendations for Best Practice*, 88 J. OF CRIM. L. 83, FN107 (2024). (describing the approved protocols in the search of the office of Michael Cohen).

¹⁵² *U.S. v. Sharma*, No. 18 Cr. 340, 2019 WL 3802223 (S.D.N.Y. Aug 13, 2019). (quoting *U.S. v. Schwimmer*, 924 F.2d 443, 447 (2d Cir. 1991).)

¹⁵³ *U.S. v. Sharma*, No. 18 Cr. 340, 2019 WL 3802223 (S.D.N.Y. Aug 13, 2019).

¹⁵⁴ *U.S. v. Stewart*, *supra* note 156.

¹⁵⁵ The same conclusion was reached when materials were seized from the offices of a criminal defense attorney. *Abbell*, 914 F.Supp. 519; *DeMassa v. Nunez* 747 F.2d 1283 (9th Cir. 1984). See also, *Jackson*, 2007 WL 3230140, where the court held that the use of a taint team was not required since the government did not yet have the records, they were not voluminous, and the defendant had already contested the subpoena so that the appearance of fairness. Spanish authorities attempt to address these issues by requiring the presence of the lawyer whose office is being searched as well as a representative of the local bar association who will ensure protection of professional secrets and that the search is limited to the office for which the warrant was issued. Court appointed so-called “special masters” are not involved. Article 24 The representative of the bar must be someone who is competent to identify and protect privileged information.

¹⁵⁶ *But see, e.g.*, N.J. Advisory on Pro Ethics, Op 701 (2006); Ariz. Common Rules Prof’l Conduct, ‘Formal Op. 05-04’ (2005), Ariz. Common Rules Prof’l Conduct, ‘Formal Op. 09-04’ (2009).

In essence, and noting the prevailing view that materials suspected of containing that which is protected by legal professional privilege might, in some circumstances, need to be removed from the searched premises, for sifting, it is clear that both jurisdictions have sanctioned processes which allow for this to happen in a manner which provides some protection for legal professional privilege. As noted above, the use of prosecution taint teams in the US arguably lacks a degree of independence which affords due protection to legal professional privilege. The same criticism might be laid at the door of the English SFO's guidelines, which allow for employees of the SFO to quarantine material for inspection by independent counsel. It would be preferable, where a risk to privilege exists, for the approach taken in the *United States v Cohen* and that which was advanced by John Charles Rees KC, in *McKenzie*; namely that any and all sifting should be undertaken by an independent third party. However, in both jurisdictions, it would seem that the pursuit of reducing cost and driving efficiency prevents such measures being implemented in all such cases.

C. VIRTUAL PROCEEDINGS

1. England and Wales

It is fair, perhaps now even trite, to say that the Coronavirus Pandemic acted as a catalyst for an increased use of technology in the criminal justice system in England and Wales. During the pandemic, the criminal courts faced significant challenges in providing sufficient spaces to conduct in-person hearings whilst also respecting social distancing requirements. Thus, judges were clothed with the power to order participants attend court via live link, as provided for, albeit temporarily, by the Coronavirus Act 2020.¹⁵⁷ These provisions were extended and fixed in law by s.200 Police, Crime, Sentencing and Courts Act 2022, which amended s.51 Criminal Justice Act 2003 to include the following:

- (1) The court may, by a direction, require or permit a person to take part in eligible criminal proceedings through -
 - (a) a live audio link, or
 - (b) a live video link.
- (2) A direction under this section may be given in relation to a member of a jury only if the direction requires all members of the jury to take part through a live video link while present at the same place.

However, remote attendance at court is by no means a new concept in the criminal justice system. Remote attendance at court by defendants was first made possible by the Crime and Disorder Act 1998.¹⁵⁸ Indeed, long before the pandemic, concerns pertaining to the impact digital communications might have on legal professional privilege have been raised. For example, Padfield and Hawker indicate, with particular regard to individuals appearing from prison, that the rooms available

¹⁵⁷ For comprehensive overview of these changes, see Laura Hoyano. *Postage Stamp Justice? Virtual Trials in the Crown Courts under the Police, Crime, Sentencing and Courts Bill* 12 CRIM. L.R. 1029 (2021).

¹⁵⁸ The then Crime and Disorder Act 1998, § 57 (UK).

at courts from which lawyers are able to communicate with their clients often lack soundproofing and that this, coupled perhaps with the fact that the poor quality of the video link requires lawyer to shout in order to be heard, presents a real risk that information covered by legal professional privilege might, albeit inadvertently, be shared with those standing near the room.¹⁵⁹ Equally, it is highlighted that prisons often lack appropriate accommodation from which counsel can confidentially consult with their client

A particular issue arises where a client is physically present at court and their lawyer is attending via video link, with courts having to be closed so that a defendant can use the video link facilities to communicate with their lawyer and, even where both parties are present in court, in England and Wales a defendant is placed in a dock which, is more often than not, completely enclosed by glass,¹⁶⁰ making confidential and privileged conversations between counsel during hearings somewhat challenging. This is one example as to where technological enhancements might deliver positive outcomes from the perspective of legal professional privilege as, during mock virtual trials it was noted that the existence of a private online room in which counsel and the defendant could converse provides for a much more secure environment for privileged communications.¹⁶¹

2. The United States

Although the first use of remote appearances by videoconferencing occurred more than fifty years ago, Covid-19 forced ‘courts in the US’ to operate remotely just as it did internationally and in England and Wales.¹⁶² In the CARES ACT, Congress expanded the authority to conduct business remotely because the national emergency materially affected the functioning of courts.¹⁶³ The Act allowed the use of teleconferencing for detention hearings, initial appearances, preliminary hearings, waivers of indictment, arraignments, probation and supervised release revocation proceedings, pretrial release revocation proceedings, appearances under Rule 40 of the FRCP, misdemeanor pleas and sentencing.¹⁶⁴ Teleconferencing was also allowed in felony pleas and sentencing, with the additional caveat that “the district judge in a particular case finds for specific reasons that the plea or sentencing in that

¹⁵⁹ Nicola Padfield & Thomas Hawker, *Sentencing via Video Link* 8 CRIM L. REV. 858 (2018).

¹⁶⁰ JUSTICE, *IN THE DOCK: REASSESSING THE USE OF THE DOCK IN CRIMINAL TRIALS*, 6 (2015).

¹⁶¹ LINDA MULCAHY, EMMA ROWDEN & WEND TEEDER, *EXPLORING THE CASE FOR VIRTUAL JURY TRIALS DURING THE COVID-19 CRISIS: AN EVALUATION OF A PILOT STUDY CONDUCTED BY JUSTICE*, 20 (2020).

¹⁶² *U.S. v. Donziger*, No. 19-CR-561, 2020 WL 5152162 (S.D.N.Y. Aug 31, 2020).; ROBIN DAVIS ET AL, DEP’T OF JUST., *RESEARCH ON VIDEOCONFERENCING AT POST-ARRAIGNMENT RELEASE HEARINGS: PHASE I REPORT* (2015).

¹⁶³ CARES Act § 15002.

¹⁶⁴ Fed. R. Civ. P. 43(b)(2), and proceedings under 18 U.S.C. § 403 (with exceptions for contested transfer hearings and juvenile delinquency adjudication or trial proceedings CARES Act § 15002(b)(1) (Note: Rule 40 deals with Arrests for failing to appear in another district or for violating conditions of release set in another district, Rule 43 deals with defendant’s presence).

case cannot be further delayed without serious harm to the interests of justice.”¹⁶⁵ In all instances, the shift to remote hearings could only take place with “consent of the defendant, or the juvenile, after consultation with counsel.”¹⁶⁶

Pre-covid, a defendant was required to be present at a felony guilty plea and their presence could not be waived. In *United States v. Bethea*,¹⁶⁷ due to serious health issues, Bethea appeared by videoconference at a combined guilty plea and sentencing hearing.¹⁶⁸ After being sentenced to twenty-one months imprisonment, Bethea appealed on the ground that Federal Rule of Criminal Procedure 43(a) required that he be physically present during his plea.¹⁶⁹ The Court agreed and remanded for re-plea and re-sentencing in the physical presence of a judge.¹⁷⁰ The requirement of actual presence changed, however, with enactment of the CARES Act.

Now, since the states of emergency authorizing expanded use of teleconferencing has lapsed, the Federal Rules of Criminal Procedure currently allow for remote proceedings for initial appearance, arraignment, and misdemeanor offenses only.¹⁷¹ Unlike in the United Kingdom, where virtual proceedings extend to jury trials and felony cases, felony trials may not take place virtually, whether they are jury trials or judge trials. For misdemeanor offenses, the arraignment, plea, trial and sentence may be by video conferencing, with the defendant’s consent.¹⁷²

Conducting proceedings virtually clearly has an impact on the ability of an attorney and client to communicate and on the confidentiality of their communications. Defendants have a constitutional right of access to counsel to prepare and make a defense¹⁷³ including all of those proceedings authorized for video conferencing under the CARES Act and the Federal Rules. In live proceedings, the defendant and counsel can meet before court and sit next to each other during proceedings so that they can communicate informally both by speaking and passing notes. This type of communication cannot be replicated in a video-conferenced proceeding. Courts have held that restricting the right to counsel to critical stages of the criminal process does not violate the Sixth Amendment,¹⁷⁴ but the question remains, if the defendant is in fact represented at a critical stage, how privileged

¹⁶⁵ CARES Act § 15002 (b)(2)(a).

¹⁶⁶ CARES Act § 15002 (4) (During COVID, use of teleconferencing was unsuccessfully challenged on the basis of lack of consent in *United States v. Howell*, 24 F.4th 1138 (7th Cir 2022). The defendant argued that consent is not valid unless the record shows a personal statement by the defendant, not one by his attorney. The court rejected that argument).

¹⁶⁷ *U.S. v. Bethea*, 888 F.3d 864 (7th Cir. 2018).

¹⁶⁸ *Id.* at 865

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 868.

¹⁷¹ Fed. R. Civ. P. 5(g), Fed. R. Civ. P.10(c).

¹⁷² Fed. R. Civ. P. 5(g), Fed. R. Civ. P.10(c), Fed. R. Civ. P (b)(2). (These rules apply to federal proceedings. Many states have their own statutes or rules concerning virtual proceedings).

¹⁷³ *Powell v. Alabama*, 287 U.S. 45 (1932).

¹⁷⁴ *U.S. v. Wade*, 388 U.S. 218 (1967) (lineup is a critical stage requiring counsel); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing is a “critical stage” requiring counsel); *Kirby v. Illinois*, 406 U.S. 682 (1972) (counsel is not required before adversarial proceedings have been initiated unless to protect an independent constitutional right).

communications can be protected. A few examples suffice. In the most obvious example, where a defendant is incarcerated, a corrections officer may be required to be present with the defendant, defeating the privilege. If the defendant is not incarcerated it may be difficult to keep third parties away entirely, depending on where and when the videoconference takes place, possibly waiving the privilege. Assuming the defendant is in a private room during the zoom, the breakout room feature could be used for privileged communications, but that would require either counsel or the defendant asking the court to interrupt proceedings so they can speak. Judges are likely to limit how many interruptions they allow for this purpose and are less likely to acknowledge a “raised hand” of a defendant than a request by counsel. And, if jurors are present, they are likely to wonder why interruptions are necessary or to draw a negative inference from them. In addition, it may be difficult for the client to get the defense attorney’s attention in the first place.¹⁷⁵

III. ANALYSIS

Protecting lawyer-client communications has become increasingly difficult, whether it be because of hacking, inadvertent disclosure, or searches of attorney digital files, the threat to private communications is widespread. Whether through direct government access to large bodies of privileged information or through inadvertent disclosure impacting the quality of the defense or the trust between defense counsel and their clients, digitalization has had an impact on the role of counsel.

To the extent that the privilege has been weakened, defense counsel’s adversarial role may be threatened. As noted by Hostettler, in the context of England and Wales, the notion of an adversarial battle forming the basis of legal decision making can be traced back to the early Eighteenth Century.¹⁷⁶ Hostettler goes on to highlight that it was the permitting of advocates in trials that led to the fierce adversarial battles¹⁷⁷ which are often envisaged as taking place in courts around England to this day.¹⁷⁸ There have been some interesting appraisals of how the adversarial nature of the English criminal justice system has been eroded, indicating a shift towards a notion of managerialism, with the role of the defence lawyer being diluted to the extent to which the English zealous advocate appears to be committed to that of a romanticized historical concept¹⁷⁹ and the adversarial case

¹⁷⁵ In addition, common experience demonstrates that multitasking is both possible and a real temptation when the client is on a screen, possibly diluting the communication and the assistance of the lawyer.

¹⁷⁶ JOHN HOSTETTLER, FIGHTING FOR JUSTICE: THE HISTORY AND ORIGINS OF ADVERSARY TRIAL 9 (2006).

¹⁷⁷ *Id.* at 115.

¹⁷⁸ In stark contrast to, for example, The Netherlands, where a criminal trial is ‘not a forum for oral argument but for the evaluation of written evidence contained in the dossier’: Louise Ellison, *The protection of vulnerable witnesses in court: an Anglo-Dutch comparison* 3 INT’L J. OF EVIDENCE & PROOF 29, 38 (1999) (citing J. F. Nijboer, *The Law of Evidence in Criminal Cases (The Netherlands)*, in FORENSIC EXPERTISE AND THE LAW OF EVIDENCE 63 (J. F. Nijboer ed., 1992)).

¹⁷⁹ *But see, generally*, ED JOHNSON, THE ROLE OF THE DEFENSE LAWYER: CONCEPTIONS AND PERCEPTIONS WITHIN A CHANGING SYSTEM (2021).

being one in which all parties are expected to find some form of common ground.¹⁸⁰ This is akin to an alternative dispute resolution mechanism such as negotiation¹⁸¹ and oceans away from the adversarial battle that is traditionally thought of when picturing the English criminal trial.

In relation to the United States, the notion that American legal procedure is adversarial (and, indeed, distinctively so) is such a given today that a statement to this effect can be found in just about every textbook and treatise on American law.¹⁸² Like England and Wales, the system in the United States is arguably not immune from challenges to its adversarial roots, for example, from the widespread practice of plea bargaining.¹⁸³ Central to adversarialism in the United States is the notion of individual rights and autonomy. The role of defense counsel in protecting the individual against the state is manifest constitutionally, legally and ethically. It is seen in the courtroom, where the defense lawyer sits next to their client, a visual demonstration of the difference between the role of counsel in the United States and in the United Kingdom, where counsel and their client are separate and indeed another lawyer, the solicitor, is more intimately involved with the client in the first instance. Any space created between the client and the lawyer hinders the proper functioning of the adversary process and its protection of client autonomy. This US focus on individualism and individual rights may be one reason why the right to counsel, and the right to silence, get greater protection in the US than in the UK, where the reasons for silence – even advice of counsel – may be subject to proof. On the other hand, the very nature of seeking to find truth by an adversarial process, where neither party is actually interested in the truth per se, may necessarily endanger the search for truth. And, of course, the protections of legal privilege can be seen as anti-truth seeking. For that reason, for example, US courts have noted that the privilege should be strictly and narrowly construed so that it does not unnecessarily intrude on the truth-seeking process.¹⁸⁴ Indeed, an

¹⁸⁰ *But see*, for example in relation to the admissibility of bad character evidence, Matt Thomason, *Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials*, 9 CRIM. L. R. 727-52 (2021); *But see*, more generally, Mike McConville and Luke Marsh, ‘Adversarialism Goes West: Case Management in Criminal Courts’, 19 INT’L J. OF EVIDENCE & PROOF 172 (2015).

¹⁸¹ Matt Thomason, *Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials*, 9 CRIM. L. REV. 727 (2021).

¹⁸² AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877*, 1 (2017).

¹⁸³ Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventative Justice and Hybrid-inquisitorialism* 57 W. & M. L. REV. 1505, 1516 (2016).

¹⁸⁴ *But see*, e.g., In Re Grand Jury Subpoena Issued to Joseph P. Powers, No. 94-56603, 1995 U.S. App. LEXIS 30124, at *3 (9th Cir. Oct. 11, 1995) (“Courts strictly construe the attorney client privilege.”); *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1423 (3d Cir. 1991) (noting that a narrow interpretation of the attorney-client privilege is necessary because the privilege hinders “the truth-finding process”); *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) (explaining that the attorney-client privilege obstructs the quest for truth); *Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) (“[T]he adverse effect of [the privilege’s] application on the disclosure of truth may be such that the privilege is strictly construed.”); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1100 (5th Cir. 1970) (“[E]xemptions from the general duty to give testimony that one is capable of giving are distinctly exceptional.”).

increasing concern that lawyer conduct can undermine the rule of law,¹⁸⁵ arising out of the lawyers' role in attempting to overturn the results of the 2020 US presidential election and in opposing efforts to prevent climate change, including excessive or improper reliance on privilege to hide relevant information, may mean that limiting the ethical or legal reliance on the privilege may become part of the analysis.

But in both jurisdictions, basic to adversarialism in the criminal process is the due process notion that the parties to a case must be on an equal footing, so as to ensure fairness in the process and the safety of verdicts. Given the superior position of the prosecution, legal professional privilege is arguably a core tenet of securing equality and fairness for the defendant, ensuring that they are able to access accurate legal advice by disclosing all relevant facts to their case to their representative, even at the risk of withholding facts that might assist the search for truth. Previously, unless an accused person and/or their lawyer was the subject of an investigation which led to the seizure of their case file, they could do so in the knowledge that the information provided to their lawyer would be held securely and confidentially by them. It is also essential to securing all other individual rights. However, as noted above, the fact that an entire digital device which contains a catalogue of case files might be seized and reviewed, undermines the extent to which an accused person can get that advice because of the fear of disclosing all relevant information to their lawyer. The very uncertainty presented, for example, by the use of prosecution taint teams, chills the ability to rely on the privilege. The same is true for the lawyer.

With all that said, it is worth considering whether there is a need to reassess the role of legal professional privilege in England and Wales and the United States respectively. It is fair to say that in both jurisdictions the courts continue to hold legal professional privilege as a revered facet of these world-renowned adversarial-based systems. However, in England and Wales at least, it is arguable that ethical and procedural rules undermine the scope and value of legal professional privilege in favor of truth seeking. A straightforward example would be the hierarchy provided for in the Code of Conduct for Barristers, which states that a barrister must, as a Core Duty, "observe [their] duty to the court in the administration of justice",¹⁸⁶ a duty which overrides all other Core Duties,¹⁸⁷ including their duty to act in the best interests of their client.¹⁸⁸ A barrister can, of course, test the prosecution's evidence, but they must stop short of leading a court to believe something to be true, which the barrister knows not to be the case.

A barrister's duty to act in the best interests of their client is also subject to a barrister's duty to act with honesty and integrity¹⁸⁹ and to their 'duty to maintain'

¹⁸⁵ The monetary and disciplinary sanctions on the lawyers involved in the "stop the steal" litigation (*But see, e.g.,* King v. Whitmer, 556 F. Supp. 3d 680 (E.D. Mich 2021), spanning investigations into more than 22 lawyers, and the role of lawyers for oil companies in opposing efforts at dealing with the dangers of climate change). *But see also*, Haley Czarnek, *In Case of Emergency Break Glass*, 17 CHARLESTON L. REV. 4 (2023). This has given rise to at least academic concern about the traditional role of the lawyer in the justice system. *But see, e.g.,* W.B. Wendel, *The New Legal Ethics: Howard Lichtenstein Distinguished Professorship in Legal Ethics Lectures* 52 HOFSTRA L. REV. 929 (2024).

¹⁸⁶ Bar Standards Board Handbook (Version 4.8) Part 2: Code of Conduct, CD1.

¹⁸⁷ *Id.* at Conduct gC 1.1.

¹⁸⁸ *Id.* at CD2.

¹⁸⁹ *Id.* at CD3/ gC 1.2.

their independence.¹⁹⁰ In essence, it is clear that, whilst a defendant might be forgiven for believing that their barrister has only one interest – getting the best result for their client – the reality is quite different. This is just one explanation as to why, as noted above, Johnston argues that English defense lawyers increasingly see themselves as more of a participant of a process and, as a consequence are becoming far more process focused and fitting of a managerialist system, and less focused on zealously defending their client.¹⁹¹ Johnston utilizes concepts such as the Defense Case Statement, on which a defendant is compelled at the pre-trial stage in Crown Court trials, to disclose the nature of their defense, to highlight the demise of the adversarial battle in the context of the English criminal trial; a fact which, in turn, erodes the adversarial nature of the English criminal defense lawyer. By contrast, whilst there exists a duty not to mislead the court,¹⁹² there exists no requirement for a defendant, or indeed their counsel, to reveal the nature of their defense in advance of trial in the United States. It is, therefore, possible to infer that the issues outlined in this Article pose a greater risk to privilege in the US, than they do in England and Wales.

Additional risks are created by prosecution access to digital attorney files, whether stored in the cloud or on a computer. In both jurisdictions while attorney files could be subject to a search warrant specifying what is sought to be seized, the digitalization of storage means vast amounts of files are exposed, including those of other clients.¹⁹³ Notwithstanding the fact that courts in both England and Wales and the US consider the seizure of entire devices in these circumstances to be lawful in the context of domestic criminal procedure, it can be argued that the seizure of entire devices is overzealous and is capable of having a disproportionate impact on an attorney's practice. While the English courts have refused to accept that analogy drawn between a computer hard disk and a filing cabinet,¹⁹⁴ this was on the basis of definition, as opposed to a concrete analysis of how these devices are used. But from a practical perspective, a lawyer's hard disk arguably constitutes a collection of files, each of which relates to a particular case or client. Moreover, the computer in which the hard disk is situated is a tool which said lawyer utilizes in the course of their profession, in essence, their pen. Whilst this might seem a trivial and perhaps far-fetched analogy, its significance is far more than merely emblematic, given how reliant members of the profession have become on electronic devices to perform their role. Thus, a lawyer without their laptop runs the risk of being unable to meet their professional obligations to their clients, such as their abovementioned duty to

¹⁹⁰ *Id.* at CD4/ gC1.2.

¹⁹¹ Ed Johnston, *The Adversarial Defence Lawyer: Myths, Disclosure and Efficiency – A Contemporary Analysis of the Role in the Era of the Criminal Procedural Rules*, 24 Int'l J. of Evidence & Proof 35 (2020).

¹⁹² *But see*, further, Dennis A. Rendleman, "Truthiness" and Professional Responsibility, A.B.A. (Dec. 2019), https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/_truthiness_-and-professional-responsibility/#:~:text=Counsel%20may%20not%20deliberately%20mislead,the%20opinions%20cited%20therein%3A.

¹⁹³ *But see* U.S. v. Stewart, No. 02 Cr. 395 (S.D.N.Y. Jun. 11, 2002) (requiring appointment of a special master following search of and seizure of files from a defendant-lawyer's office that was shared with other lawyers).

¹⁹⁴ *But see* discussion pertaining to R. (on the application of H) v. Inland Revenue Commissioners [2002] EWHC 2164 (Admin) (U.K.) above.

act in the best interests of their client,¹⁹⁵ due to their not having access to relevant files and systems, potentially for an indefinite period.¹⁹⁶

Once seized, at least in the United States, in many cases the person analyzing a device in order to determine what is privileged and what is not is a member of law enforcement or of the prosecution. Again, as some US courts have held, requiring the participation of a properly qualified attorney, (or special master), or in the European case, a member of the Bar Association, would ensure greater protection. This is also the case in England and Wales where, as noted above, independent members have been brought in to review material so as to ensure investigators do not have access to privileged material.¹⁹⁷ The advantage of requiring a procedure involving a bar association member or designee is that the court is not involved in the selection of the person in charge of the review. Moreover, the essentially unstructured access to potentially privileged communications, in the US, has, in turn, the potential to weaken the footing on which the defendant stands, thus undermining adversarialism in this context. So does the truncated ability to request and maintain privileged communications in virtual communications and proceedings.

From a human rights perspective, the European Convention on Human Rights¹⁹⁸ does, at times, provide lawyers with special treatment, arguably due to the impact that an invasion into a lawyer's office has. Specifically in relation to legal professional privilege, "Article 8 affords strengthened protection to all communication between lawyers and their clients".¹⁹⁹ The European Court of Human Rights²⁰⁰ makes it clear, that the absence of domestic legislation and/or procedural rules that pay due regard to legal professional privilege in the context of data on lawyer's devices which points to a breach of Article 8(2) ECHR.²⁰¹ In essence, in England and Wales, it is arguably very difficult to challenge the seizure and search of lawyers' devices, provided the processes pertaining to the search for, seizure and search of devices are conducted in accordance with the domestic legislation and associated Attorney General's guidelines outlined earlier in this Article.

Ultimately, determining the scope of professional privilege presents a balance between society's right to and need for evidence in the search for truth and crime

¹⁹⁵ See above, regarding BSB Handbook, CD2 (U.K.).

¹⁹⁶ Police and Criminal Evidence Act 1984, § 22 (U.K.). (allows devices to be 'retained so long as is necessary in all the circumstances', which might be until trial, some years after the original seizure) *But see*, further, Attorney General's Office, *Attorney General's Guidelines on Disclosure: For Investigators, Prosecutors and Defence Practitioners*, 31 (Gov.UK 2022).

¹⁹⁷ *But see* discussion pertaining to R. (On the Application of S, F and L) v. Chief Constable of the British Transport Police, The Southwark Crown Court [2013] EWHC 2189 (Admin) (U.K.), above.

¹⁹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, [Hereinafter ECHR].

¹⁹⁹ ECtHR, *Key Theme: Articles 8 and 10 of the Convention and Article 1 of Protocol No. 1 to the Convention The rights of lawyers in the Court's case-law*, ECHR-KS, 2, https://ks.echr.coe.int/documents/d/echr-ks/the-rights-of-lawyers-in-the-court_s-case-law (last visited Aug. 21, 2024). Interestingly, the ECtHR, unlike the courts of England and Wales, does not appear to recognise the significance of the purpose of communication when determining whether privilege exists in relation to a particular communication.

²⁰⁰ Hereinafter ECtHR.

²⁰¹ *Särgava v. Estonia*, No. 698/19, ECHR [2021].

fighting and protection of the individual. In the England and Wales, for example, that balancing has resulted in the need for criminal defendants to consider revealing their lawyer's advice in order to avoid a negative inference as to their guilt following the failure to answer questions posed during police interviews. No such situation exists in the United States, because of a more expansive view of the right to counsel there. In both jurisdictions, however, the ability of a client to speak frankly to an attorney is the cornerstone of the right to a defense. In this vein, new technology creates risks for communications, storage, searches and virtual proceedings, creating uncertainty in the application of privilege that itself could prevent full disclosure by a client, particularly if they are made aware of all the risks outlined throughout the course of this Article.

Finally, whilst a detailed analysis of Artificial Intelligence (AI) is beyond the scope of this Article, given its growing prevalence it must be addressed, albeit briefly. Here we pose the question: is AI the future lawyer's dream, or is it an ethical nightmare? The legal profession is not immune from the inroads made by AI. In the USA, a lawyer was recently fined for using AI to generate documentation submitted to court which contained legal authorities which did not, in fact, exist.²⁰² In Canada, lawyers face fee reductions for not using AI to streamline their approach to carrying out work for their client.²⁰³ This is an indication of the risk that reliance on AI poses to lawyer's professional standing, particularly with regards to the integrity of the work they produce, and the efficiency of their practice. However, in the context of attorney-client privilege, the position may be a little less clear. On the one hand, there exists a clear data protection issue that might arise when a lawyer inserts information pertinent to their client's case into an AI tool, which might be considered a breach of privilege.²⁰⁴ In addition, given that judges have recently cited their use of AI in the drafting of a judgement,²⁰⁵ there is arguably a risk that, should a lawyer add privileged material to an AI database that is subsequently utilized by a judge, the judge might inadvertently become privy to privileged information which was not laid before the court in evidence. It is the authors' view that there exists insufficient protection across AI platforms to eradicate this risk.

²⁰² *But see, e.g.*, *Mata v. Avianca, Inc.*, 678 F.Supp. 3d 443 (S.D.N.Y. 2023); Dan Milmo, *Two US Lawyers Fined For Submitting Fake Court Citations From Chatgpt*, THE GUARDIAN, Jun. 23, 2023, <https://www.theguardian.com/technology/2023/jun/23/two-us-lawyers-fined-submitting-fake-court-citations-chatgpt>.

²⁰³ Lexis Nexis, *Artificial Intelligence: Judge Slams Attorney for Not Using AI in Court*, https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/judge-slams-attorney-for-not-using-ai-in-court?srsId=AfmBOoqTQK9lynIizdNWa4bZ6CLdoE13Hns9OC8FCho-1VC02_fDVnzJ (last visited Nov. 12, 2024).

²⁰⁴ This is an issue which could be circumvented through the use of a 'paid for' package with adequate data protection mechanisms in place, in the same way that case management tools are used. Indeed Professor Carol Needham (St Louis University), at the 2024 International Legal Ethics Conference (Amsterdam Law School) suggested that regulators of the legal professions could devise an approved list of AI providers and tools, whose services could be purchased by chambers and firms.

²⁰⁵ Hibaq Farah, *Court of appeal judge praises 'jolly useful' ChatGPT after asking it for legal summary*, THE GUARDIAN, Sep. 15, 2023, <https://www.theguardian.com/technology/2023/sep/15/court-of-appeal-judge-praises-jolly-useful-chatgpt-after-asking-it-for-legal-summary> (last visited Aug. 19, 2024).

By contrast, in the context of the search for and seizure of a lawyer's case files, AI technology might assist in a search a lawyer's computer and recover only files not covered by attorney-client privilege.²⁰⁶ In both jurisdictions, this could reduce the extent to which a privilege is undermined/eroded by such search, and may mean that devices may not need to be seized, thus limiting the impact on clients whose data is not the subject of the search and, ultimately, the lawyer's professional practice. However, as alluded to above, the use of AI must be tightly regulated and protection ensured, so as to eradicate any risk to attorney-client privilege posed by the use of AI to sift seized documents. Ultimately, further research is needed in order to understand the impact of AI on attorney-client privilege, in addition to any benefits it might pose to an attorney's professional practice.

IV. CONCLUSIONS AND RECOMMENDATIONS

It is clear that rapidly expanding digitalisation in the criminal process has the potential to seriously undermine the sanctity of the oldest privilege recognized in law. The impact on legal professional privilege of the way in which lawyers communicate with their clients, both outside of and within formal hearings, in addition to the way in which electronic devices are now used to store data pertaining clients, cannot, and should not, be underestimated. As noted throughout this Article, legislators and judges appear somewhat content in melding existing rules and practices to fit these changes. However, it is suggested that this approach is insufficient in terms of ensuring that legal professional privilege remains an effective protection and continues to facilitate full and frank discussions between lawyer and client.

In order to remedy these challenges, data protection considerations must be at the forefront of lawyers' minds, and reasonable steps must be taken to protect privileged information. This includes focusing on data protection during a lawyer's ethical training, and doing so in a way that goes beyond warnings about working on confidential files in a public place. Lawyers need to consider the issue of privilege in the context of everything they do, whether it be in relation to the materials they print and store when working at home or how they utilise email and instant messaging to contact their clients. In addition, lawyers should be trained and regulated in relation to provision of advice pertaining to privilege, in particular, how clients can avoid inadvertent waiver. Linked to this, there is a need to re-think the way in which inadvertent disclosure is treated by the courts. As noted in this Article, rules in both England and Wales and the US were designed at a time when communication was more secure and the accidental inclusion of non-intended recipients much more difficult.²⁰⁷

In relation to protecting and thus enabling privileged conversations during hearings, it was highlighted that a fully virtual trial might facilitate better opportunities, as both the lawyer and client can have a virtual private consultation

²⁰⁶ *But see, e.g.*, CLOUDLEX, <https://www.cloudlex.com/features/advanced-ai-search/>. *But see, also*, Edward S. Adams, *When Taint Teams Go Awry: Laundering Unconstitutional Violations of the Fourth Amendment*, 75 ARK. L. REV. 753, 780 (2023) (discussing the pros and cons of using predictive modeling in sifting seized attorney files).

²⁰⁷ *E.g.* when email did not exist, and certainly 'reply all' did not exist, and when most communication was sent to addresses via post.

room. However, when considering the nuances of this, it is distinctly possible that both the lawyer and their client will be in locations where there is a risk of their being overheard.²⁰⁸ This is a particular issue where one party to the conversation is in court, and the other is attending court remotely. In order to remedy this, legislation could require that lawyer and client should be located in the same place. Thus, if a defendant client is remanded in custody, their lawyer should appear from prison with their client. Where the defendant is remanded on bail, they should attend their lawyer's office to attend the hearing remotely. It is recognised that the latter option can only apply to pre-trial hearings, where the defendant is not at risk of being taken into immediate custody. However, it would eliminate the undesirable but not unheard of situation in England and Wales, defendant appears at court in person, while their counsel is permitted to appear remotely. Indeed, an amendment to S51 Criminal Justice Act 2003 could require that a direction for a lawyer and/or defendant to attend remotely should only be made where both are to be located in the same place.²⁰⁹ This may however not be achievable bearing in mind the number of cases a lawyer may be expected to deal with on any particular day.

In order to protect legal professional privilege in the context of the search of lawyer's premises and the seizure and search of their devices, attorneys should be mindful that the government may seize entire devices rather than specific case files, and contingency plans should be in place to ensure that privilege of all their clients is protected. This will also help to ensure business continuity and, perhaps most significantly in this context, the ability to continue to provide diligent services to their clients. This might mean, for example, that attorneys should consider the use of a case management system or file storage which has a form of secure cloud-based back-up. In addition, and noting that it is ultimately a lawyer's duty to ensure that privileged information and communications are protected, searches of a lawyer's office without the lawyer in question present should only take place in exceptional circumstances, with specific authority from the court. Further, the presence at a search of an objective third-party attorney, possibly from a bar-association or other list of qualified attorneys who is independent of the court and law enforcement agencies and can distinguish between privileged and unprivileged material should be required,

Once seized, any searching of a lawyer's device should be undertaken by a competent third party who is competent to do so and this should, where possible, be carried out at the scene of the search. Search methods, including search terms, should be formulated with the consultation of the attorney whose devices are being searched²¹⁰ and entire devices should only be seized where it is absolutely necessary

²⁰⁸ *But see* discussion pertaining to prison consultation rooms, text accompanying note 159 *supra*.

²⁰⁹ It is noteworthy that this requirement exists in relation to jurors, in that in order for a juror to appear remotely, all jurors must be located in the same place. *See* §51(2) C.J.A. 2002 and further: LINDA MULCAHY, EMMA ROWDEN & WEND TEEDER, TESTING THE CASE FOR A VIRTUAL COURTROOM WITH A PHYSICAL JURY HUB – SECOND EVALUATION OF A VIRTUAL TRIAL PILOT STUDY CONDUCTED BY JUSTICE (2021).

²¹⁰ R. Mitchell et al., *The Search and Seizure of Digital Materials Under Warrant and Protecting Privilege: Comparative Analysis and Recommendations for Best Practice*, 88 J. OF CRIM. L. 83, 90 (2024).

to do so. In the longer term, and in all cases,²¹¹ judges on both sides of the Atlantic should consider whether the seizure of entire devices is at all proportionate, or whether there are other less intrusive measures available. The notion that a device can be seized and held until trial, whilst not currently unlawful, is unsatisfactory, particularly as there exist ways of quickly gathering evidence from devices and returning them to those from which said devices were seized.

The dangers posed by the Digital Age to the long-standing protections of the legal professional privilege are real. Attorneys, courts and regulators must gain and maintain currency and competence with technological developments and their unique challenges, in order to protect the importance of disclosure in the attorney-client relationship and the right to assistance of counsel.

²¹¹ Not just those pertaining to lawyers.

INTERGOVERNMENTAL CONFLICTS IN A TIME OF PANDEMIC: STATE AND MUNICIPALITY POWER STRUGGLES IN THE UNITED STATES AND BRAZIL

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ABSTRACT

This article examines the issue of overlapping and competing responsibilities and competences that arose in the United States and Brazil, following the COVID-19 global emergency of 2020. It considers the way in which the diffusion of power within both federal systems generated intergovernmental conflict and the extent to which the differences in federal design shaped the way in which these conflicts could be managed and resolved.

KEYWORDS

Intergovernmental responses and conflicts, COVID-19, federal design, municipalities in a federal constitution

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INTRODUCTION

As the World Health Organisation declared the COVID-19 global health emergency officially over,¹ the United States and Brazil topped the list of countries that in terms of the number of cases and percentage of deaths by population had been worst affected.² The reasons for this are multifarious and much has been written concerning the absence of effective leadership on the part of the presidents of both of these countries. The United States and Brazil however are federal countries with constitutions that diffuse regulatory power away from the centre in favour of state and local governments. In the absence of strong presidential leadership, the frontline of response was at these lower levels with a resulting patchwork of responses that did little to promote public confidence in the ability of their governments to control the spread of the disease. Both countries saw popular opposition to and protests against public health emergency orders which closed businesses and schools, required masks to be worn on public transport and in public places and at their most extreme, required citizens to stay at home or ‘shelter in place’. In both countries, these orders generated law suits framed in terms of infringement of constitutional rights. These cases typically turned on arguments concerning the balance to be reached when the exercise of individual rights and liberties must give way to, and can justifiably be restrained in, the public interest. The arguments are familiar, in principle if not in specifics, and are not rehearsed here. More generally however, and specifically of interest for this article, is the issue of overlapping and competing responsibilities and competences that accompany the diffusion of power within a federal system, the intergovernmental conflict that can ensue and the extent to which federal design shaped the way in which these conflicts could be managed and resolved. These conflicts foreground important differences in two federal models that typify the contrast between what Professor Hirschl identifies as old and new world constitutionalism, notably the extent to which they formally recognise and allocate a place within the federal structure to local authority and specifically to the city.³

Professor Hirschl’s book *City, State: Constitutionalism and the Megacity* sets out to address what he considers to be “a fundamental void” within contemporary constitutional scholarship, namely the absence of serious consideration to the role of the city. This is of concern when we consider that the ever-growing numbers of people who now live in the urban agglomerations he terms ‘megacities’ increasingly represent the majority of the world’s population and that it is the city that is now a major, if not the major, provider and regulator of the resources, infrastructure and services that support their lives. This absence, he suggests, is more than scholarly silence because it mirrors “hard wired” constitutional arrangements “featuring constitutional division of competences adopted in a pre-megacity era and increasingly detached from twenty-first century realities.”⁴ In this connection he draws a distinction between the “hard-wired city-subverting constitutional

¹ <https://www.reuters.com/business/healthcare-pharmaceuticals/covid-is-no-longer-global-health-emergency-who-2023-05-05/>.

² <https://www.statista.com/statistics/1093256/novel-coronavirus-2019ncov-deaths-worldwide-by-country/> (accessed 9 Oct. 2023).

³ RAN HIRSCHL, *CITY, STATE: CONSTITUTIONALISM AND THE MEGACITY* 7-19 (2020).

⁴ *Id.* at 10.

frameworks” of much of the ‘old world’ Global North and “new world” constitutional orders, largely those of the Global South. The former, adopted over a two-hundred year period between the late eighteenth century and the 1970s include the U. S. constitutional order; the latter with “potential to facilitate accommodation with the reality of urban power” include that of Brazil.

The U.S federal model divides power between the federal government and the fifty states and has nothing further to say concerning a role for local authorities. Constitutional amendment is difficult if not functionally impossible so that decisions concerning city empowerment or restraint continue to be matters for the laws and constitutions of the individual states from which the cities draw their powers. Absent a constitutional framework that can mediate conflicts between city and state governments, law suits concerning the scope of municipal powers will be determined by reference to state law that typically accords precedence to state interests and priorities. This means that when, for example, in the current crisis, cities object to the scope of gubernatorial executive orders, city challenges are unlikely to succeed when brought by way of law suits framed in terms of demarcation of power but are more likely be resolved by means of processes of political accommodation and adjustment.

In relation to Brazil however, the position is different. Article 1 of the Brazilian Federal Constitution of 1988 (CF-88) states: “The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state [...]”The new Brazilian constitution, adopted in 1988 after a 20-year military dictatorship, set out to create a decentralized three-tier federal state with specific recognition of local governments, “municípios”, provided with autonomy (the right to self-organization, self-government and self-administration) and executive competencies in relation to the delivery of public services and goods.⁵ As one co-author has observed: “a decentralized option was almost intuitive in a country with such a large territorial expanse and, further, such a system was already rooted in Brazilian history.⁶ The challenge was to conceive a federalist model fit to create a national government that not only recognized and respected the cultural diversity of its territory but would also facilitate the ability of local governments to “act in a synchronized manner to avoid a cacophony of conflicting political standards.”⁷ Today, Brazil has 5,570 “municípios”⁸ with exclusive power to legislate in relation to matters of local interest. The fact that Article 30 gives no definition of what constitutes a local interest means that the scope of local autonomy in practice falls to be determined by the courts.⁹ Thus in contrast

⁵ Art 30 CF-88 states that “The municipalities have the power to: I. legislate upon local interest”. However, there is no definition of what local interest is.

⁶ See Vanice Regina Lirio do Valle, *The Brazilian Constitution: Context, Structure and Current Challenges* 9 BR. J. AM. LEG. STUDIES (2020) (noting that “[e]ven in its original organization as a colony under Portuguese domination, Brazil was territorially divided into “hereditary captaincies” (capitanias hereditárias).”).

⁷ Bruce A. Antkowiak, *Contemplating Brazilian Federalism: Reflections on the Promise of Liberty*, 43 DUQ. L. REV. 599, 601 (2005).

⁸ See Vanice Regina Lirio do Valle, *The Brazilian Constitution: Context, Structure and Current Challenges* 9 BR. J. AM. LEG. STUDIES (2020).

⁹ Gilberto M. A. Rodriguez, *Are Cities Constituent Units in Brazil’s Federalism?* 50 SHADES OF FEDERALISM, <http://50shadesoffederalism.com/case-studies/cities-constituent-units-brazils-federalism/>.

to the U.S. experience and fuelled by the re-emergence of intergovernmental hierarchies that Professor Hirschl suggest may be “deeply engrained”¹⁰ in Brazil’s constitutional culture we see the judicialization of disputes concerning competences and responsibilities which have ultimately had to be decided by the country’s constitutional court.

In Brazil, in the context of a conflict between a federal government led by a Covid-impact-denying President and states and municipalities seeking to put in place measures for the protection of public health and the control of the pandemic, the Federal Supreme Court of Brazil (SFT) has been asked to pronounce specifically upon the constitutional allocation of competencies on two occasions. Part I of this article considers these law suits and the context in which they arose with the premise that they have something important to contribute to our understanding of federalism and constitutional design in Brazil.

By way of contrast, Part II of this article moves to the United States where the public health concern is similar but the constitutional dynamic is different. In this Part we identify and examine disputes between five states and their municipalities. In the absence of a constitutional framework that can recognise and empower local authorities vis-à-vis the states to which, in legal terms, they belong, the disputes to date have not made it into a federal court but are framed in terms of state law under which they stand little prospect of success. We note however that in some of the court filings it is possible to discern the rudiments of an argument for independent local autonomy which its proponents claim is deeply rooted in the U.S. concept of democracy and consider whether this is an argument whose time may now have come.

PART I BRAZIL: COVID -19 AND THE ROLE OF THE FEDERAL SUPREME COURT

In Brazil the pandemic tested the fragilities of constitutional design at both the intersection of federal, state, and local government competencies and the processes for managing intergovernmental disputes. What emerged was a story of a president who, for political gain, pitted himself against the federation, but in the words of UACES commentators Rodriguez and de Valera, the result was a “positive outcome for the Brazilian federal system”:

new horizontal intergovernmental relations have been strengthening subnational autonomy and decentralization. A broad recognition that states and municipalities are doing the right thing is spreading both national[ly] and internationally. The Brazilian federation will [...]not [be] the same after the COVID-19 pandemic.¹¹

¹⁰ HIRSCHL, *supra* note 3 at 13.

¹¹ Gilberto M. A. Rodriguez & Vanessa Oliveiras de Valera, *Brazil and Covid-19: The President Against the Federation*, UACES Territorial Politics, <https://uacesterrpol.wordpress.com/2020/06/05/brazil-and-covid-19-the-president-against-the-federation/>

This outcome is in no small part attributable to the role of the Federal Supreme Court of Brazil (FSC) which handed down several major decisions which have had the effect of strengthening the autonomy of regional and local authorities as against the federal government.

This Part of this article now proceeds as follows. In Section A we briefly outline the early chronology of the federal and state responses to the emerging public health crisis. We note that the pattern of responses was shaped by underlying political conflicts which came before the FSC, framed in terms of constitutional competences.

In Section B we examine the FSC responses by reference to the constitutional framework that was put in place following the adoption of a new democratic constitution in 1988. We focus specifically on these issues: a) the formalization within the new federal union of a role for municipalities as equal members the union together with the states and the federal government, b) the open quality of constitutional drafting which has required the judiciary to take on an enhanced role in terms of filling the silences and omissions of the 1988 document; c) the judicialization of intergovernmental disputes as politics by another means and d) in the particular context of Covid-19 induced intergovernmental politics, the recent judicial pronouncements which have enhanced the authority of local decision-making in relation to constitutionally allocated competences. While in the context of this particular emergency, the outcome has been positive for regional government and municipal autonomy specifically, we query whether the preference for a judicial solution to what are essentially political disputes will in the longer term erode the authority of the Court which has no independent power of implementation, absent the existence of a supportive political will.

A. COVID-19 AND THE JUDICIALIZATION OF POLITICS

President Bolsonaro's initial response was to refuse to recognize the severity of the threat, dismissing COVID-19 as "simply flu", and stating that the risks to public health were overestimated.¹² Faced with the exponential rise of the disease in their own states, governors from São Paulo and Rio de Janeiro assumed the initiative and issued precautionary stay-at-home orders, closing business and schools. The governors of others states where rates of infection were still low, waited for directions from the central government.¹³ What followed was shaped more by political considerations than those of public health.

The states of São Paulo and Rio de Janeiro are the largest in the federation. Both states were governed by political opponents of President Bolsonaro; João Doria, governor of São Paulo was a prospective presidential candidate, running against Bolsonaro; and at the time, so too was Wilson Witzel, governor of Rio de

¹² Nick Paton Walsh, Jo Shelley, Eduardo Duwe and William Bonnett, *Bolsonaro Calls Coronavirus a 'Little Flu.'* *Inside Brazil's Hospitals, Doctors Know the Horrifying Reality*, CNN, May 23, 2020, <https://edition.cnn.com/2020/05/23/americas/brazil-coronavirus-hospitals-intl/index.html>.

¹³ Manuel Ventura, *Estados Esperam Socorro do Governo há 70 Dias; Ajuda Só Deve Chegar na Semana Que Vem*, O GLOBO, <https://oglobo.globo.com/economia/estados-esperam-socorro-do-governo-ha-70-dias-ajuda-so-deve-chegar-na-semana-que-vem-1-24461703>.

Janeiro¹⁴. On March 20, 2020, Bolsonaro in an attempt to regain the initiative, issued Provisional Measures 926 and 927, altering the legal framework previously established by Federal Law 13.979/2020, and concentrating with the central government, power to: a) decide what kind of public services should be considered essential and therefore, exempt from pandemic restrictions; b) approve restrictions to intermunicipal or interstate transportation determined by states and municipalities; c) approve, through the Health Ministry, all restrictive measures determined by states and municipalities. The effect was to change the role of central government from coordination, to that of leadership of the struggle to control the pandemic.

Three days later, the constitutionality of those Provisional Measures was challenged by the Democratic Labor Party (ADI 6341¹⁵) and the Sustainability Network Party (ADI 6343¹⁶) in the Federal Supreme Court (STF) by means of ADIs 6341 and 6343.¹⁷ In March 24th, 2020 Justice Marco Aurelio granted the Democratic Labor Party a preliminary injunction in ADI 6341, "... to make explicit, in the pedagogical field, according to STF's understanding, the concurrent competency" [among the three federative layers]. Both ADIs were submitted to a full bench.

In April 14th, 2020 in ADI 6343, the Court in a 7 to 4 ruling, confirmed the public health competencies of states and municipalities and suspended the requirement that decisions related to protective measures be submitted to the central government:

The federal entities do not need to abide by a technical authorization provided by the central government in order to enforce every local policy designed to contain the effects of the pandemic but every local measure must be grounded by a technical or scientific justification.

The Union, the states, and the municipalities may each restrict the right to movement within the country in order to contain the spread of the pandemic according to their respective constitutional powers; but they shall not restrain the essential goods and services from circulating freely.¹⁸

¹⁴ The situation changed dramatically regarding Rio de Janeiro. The initiation of an impeachment process against Wilson Witzel in June 2020, based on serious accusations about corruption in contracts related to facing the pandemics eliminated his chances in the presidential candidacy running.

¹⁵ ADI 6341, Justice-Rapporteur Marco Aurélio, Justice-Editor for the ruling, Edson Fachin, ruled on April 15th, 2020.

¹⁶ ADI 6343, Justice-Rapporteur Marco Aurélio, Justice-Editor for the ruling, Alexandre de Moraes, ruled on May 6, 2020.

¹⁷ ADI stands for "unconstitutionality declaration action" in a literal translation; this is a specific procedure held at the Brazilian Federal Supreme Court to exercise abstract judicial review of laws, administrative general regulation, and even of constitutional amendments. It is also applicable to Provisional Measures, due to their legislative nature.

¹⁸ Brasil. Supremo Tribunal Federal (STF). Case law compilation [recurso eletrônico]: Covid-19 / Brazilian Federal Supreme Court. – 2d ed. rev. and updated. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2021. eBook (v.1, 92 p.), p. 28, available at https://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/case_law_compilation_covid19_2.pdf.

On April 15th, 2020 the preliminary injunction granted in ADI 6341 was confirmed in a 7 to 4 ruling. The opinion stated:

The head of the federal executive branch has competence to issue decrees establishing which public services and activities are considered essential, and such act does not violate the competence that the federal entities share to legislate on health matters, as long as the decree safeguards the autonomy of the states, the municipalities, and the Federal District.¹⁹

The arrival of vaccines, and the need to provide a public program to regulate distribution and administration prompted a second set of lawsuits which again raised the issue of the intersection of federal, state and local government responsibilities to protect public health. Here, once again, political considerations led President Bolsonaro to initially deny the need for vaccination and refuse to authorize the national roll out of the Corona-Vac vaccine, negotiations for purchase and distribution of which had been led by his political adversary João Doria, the governor of São Paulo.²⁰ Pending the approval of the vaccine by ANVISA (the national agency for drug administration), Doria announced the intention to start mandatory vaccination on January 2020.²¹ The messages coming out of the federal government at the time were contradictory and unclear; on the one hand mandatory vaccination was said to be a violation of personal liberty and therefore, unconstitutional; on the other, even if it were permissible, the effect of FSC rulings ADI 6341 and 6343, claimed the President, was that the central government lacked competency in this area.

The federal conflict was once again submitted to the STF by the Democratic Labor Party in ADI 6586²² and by the Brazilian Labor Party in ADI 6587.²³ These lawsuits not only raised the constitutionality of mandatory vaccination, but also whether state and municipalities were invested with authority to design and carry on their own vaccination programs. Once again, the ruling favored states and municipalities which were pronounced competent to regulate and implement health measures regarding the pandemic:

¹⁹ Brasil. Supremo Tribunal Federal (STF). Case law compilation [recurso eletrônico] : Covid-19 / Brazilian Federal Supreme Court. – 2nd ed. rev. and updated. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2021. eBook (v.1, 92 p.), p. 23, available at https://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/case_law_compilation_covid19_2.pdf.

²⁰ Tom Phillips. *Bolsonaro Rival Hails Covid Vaccinations as 'Triumph of Science Against Denialists'*. THE GUARDIAN, Jan. 18, 2021.

²¹ Terrence McCoy. *Should a Coronavirus Vaccine Be Mandatory? In Brazil's Most Populous State It Will Be*. WASH. POST, Dec. 7, 2020. 1

²² BRASIL. Supremo Tribunal Federal. ADI 6586, Justice Rapporteur Ricardo Lewandowsky, Tribunal Pleno, ruled in December 17th, 2020, DJe-063 DIVULG 06-04-2021 PUBLIC 07-04-2021)

²³ BRASIL. Supremo Tribunal Federal. ADI 6587, Justice Rapporteur Ricardo Lewandowsky, Tribunal Pleno, ruled in December 17th, 2020, DJe-063 DIVULG 06-04-2021 PUBLIC 07-04-2021)

(B) those measures, with the exposed limitations, can be implemented by the Union, and also by States, the Federal District and Municipalities, according to their respective competencies range.²⁴

This landmark decision raised eyebrows in some quarters because it was out of line with the Court's own precedents but entirely "coherent with its tradition in standing up for human rights in a broad sense."²⁵

The point of interest for this paper is what this tells us about the nature of federalism in Brazil and specifically the place of sub-federal governments with the Union and the role of the courts in mediating inter-governmental conflict; on both occasions, the answer to political disputes was judicialization—and a prompt and decisive response from the STF. In order to understand how the political conflict became framed in constitutional terms, one must first understand the challenges presented by Brazilian federalism.

B. INTER-GOVERNMENTAL RELATIONS IN A THREE-TIER CONSTITUTION

The end of the military regime and the holding of democratic elections in 1985 represented an opportunity for a new constitutional beginning for Brazil. Although inspired by and intentionally modelled upon the U.S. federal constitution, the "supremely ugly" document promulgated on October 5, 1988 has been described as "a badly written, internally inconsistent, and transient constitution" that [...] has generated debate controversy and ultimately litigation raising fundamental issues of constitutional design.²⁶ From the standpoint of coherence and clarity this is indeed the case and the complexities of coordinate, conflicting and interacting competencies which the constitution instantiates are very much the concern of this article. Nevertheless, it should also be noted that, as Professor Reich suggests, viewed as a product of the shifting politics of regime transition, the Constitution represents a "complex and relatively successful social truce" because it "came out of a process in which society's most important actors argued, cajoled, and threatened one another, finally arriving at an ugly set of compromises that nevertheless skirted the explosive issues surrounding the transition from the military."²⁷

Difficult though those compromises were to achieve—the deliberations of the National Constituent Assembly lasted for 20 months—there is no doubt about the desire for a lasting commitment to social change. During the promulgation ceremony, Ulisses Guimarães, President of the National Constituent Assembly, asserted that "the Constitution intends to be the voice, the letter, the political will towards change."²⁸ The inclusion of express human rights guarantees—Article 5

²⁴ BRASIL. Supremo Tribunal Federal. ADI 6586, Justice Rapporteur Ricardo Lewandowsky, Tribunal Pleno, ruled in December 17th, 2020, DJe-063 DIVULG 06-04-2021 PUBLIC 07-04-2021).

²⁵ See Gilberto M. A. Rodriguez et al., *Brazil and the Fight Against Covid-19: Strengthening State and Municipal Powers* Federation, in *COMPARATIVE FEDERALISM AND COVID-19* 248 (Nico Steytler ed., 2021).

²⁶ Gary M. Reich, *The 1988 Constitution a Decade Later: Ugly Compromises Reconsidered*, 40 J. INTERAMERICAN STUD. & WORLD AFF. 5, 6 (1998).

²⁷ *Id.*

²⁸ Ulisses Guimarães. *Discurso de Proclamação da Constituição de 1988*. Diário da Assembleia Nacional Constituinte (Oct. 5th, 1988) 14380, <https://www2.camara>.

of the 1988 Constitution lists 79 different fundamental rights and Article 7 lists 34 social rights would be the expression, and local empowerment a reinvigorated agency of that commitment.²⁹

Brazil's 2015 National Report to the UN Habitat III, declared that Brazil is considered a highly decentralized country since the 1988 Federal Constitution, which raised municipalities to the status of federative entities, [on] equal terms with states and the Union.³⁰ In constitutional terms, federalism as a mechanism for reconciling imperatives for local autonomy with the efficiency and unity that central government can provide, is not new to Brazil. Indeed, as Professor Reich points out, in one form or another, federalism offers a sensible model of governance for a country as large as Brazil, so that at least since 1891, governance in Brazil has "oscillated between centralized and decentralized political governance"³¹ The prolonged 20 month period of political negotiation and manoeuvring over the precise nature of the institutional framework that the new constitution was to achieve culminated in the 245 articles and 70 transitory provisions of the new Brazilian Constitution, a detailed examination of which is outside the scope of this article.³² Of specific interest for this article however are first, the recognition within the constitutional framework of a place for municipalities with specific competencies that are coordinate with those of the states and second the absence of a detailed framework for adjudicating upon intergovernmental conflict and disputes. Instead the constitution relies upon cooperation as the mechanism for regulating the intergovernmental dynamic with the details to be identified by means of legislation which to date has not materialized.³³ The result is that the task of resolution of intergovernmental conflict falls to the Federal Supreme Court (FSC) to be determined by reference to indeterminate constitutional provisions, many of which are inherently unclear.

Recognition of a formal place for municipalities within Brazil's constitutional arrangements was not, of itself, entirely new. The current (1988) constitution is the seventh iteration dating back to 1824 of attempts to adjust the competing claims of centralization and diffusion of power to the regions.³⁴ It reflects a longstanding discontent on the part of municipalities with their political subordination to states

leg.br/atividade-legislativa/plenario/discursos/escrevendohistoria/centenario-deputadoullysses-guimaraes/discurso-de-05101988 (Braz.).

²⁹ See Vanice Regina Lirio do. Valle, *Dialogical Constitutionalism Manifestations in Brazilian Judicial Review*. 1 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS 59 (2014).

³⁰ Available at <http://uploads.habitat3.org/hb3/Brazil-National-Report-Habitat-III.pdf>.

³¹ *Id.* at "Brazilian federalism has gone through the following five distinct phases: (1) the Old Republic (1889-1930); (2) the authoritarian rule of Getúlio Vargas; (3) the Democratic Restoration period (1945-1964); (4) the Military Regimes (1964-1985); and (5) the New Republic (1985 to the present)."

³² See Vanice Valle, *The Brazilian Constitution: Context, Structure and Current Challenges* 9 BR. J. AM. LEG. STUDIES (2019). See also Bruce Ackerman, *Brazil's Constitutional Dilemma in Comparative Perspective: Do Chile and Spain Cast Light on the Bolsonaro Crisis*, I-CONnect (July 16, 2020), <http://www.iconnectblog.com/2020/07/brazil's-constitutional-dilemma-in-comparative-perspective--do-chile-and-spain-cast-light-on-the-bolsonaro-crisis/>

³³ See Rodriguez, *supra* note 25, at 206.

³⁴ See Bruno Carneiro Oliveira, *Federalism and Municipalism in the Political Trajectory of Brazil*, 17 MERCATOR 1 (2018).

particularly on the part of those in the position of state capitals with significant revenue resources and advanced economic development, The broad range of socioeconomic rights conferred by the new constitution intensified the criticism against a centralized model. After all, “cities can deliver where big government can’t.”³⁵ In the search for a tool that could promote the collaboration of the federative bodies in the public programs those social rights would require,³⁶ decentralization presented itself as a good solution. The 1988 constitution now recognizes municipalities as constituent federative units with political and administrative autonomy,³⁷ competencies under Article 23(II) in common with the Union and the States upon specific matters, which include the provision of health and public assistance³⁸ and specific power under Article 30 to:

- I – legislate upon matters of local interest;
- II – supplement federal and state legislations where pertinent; and
- III – institute and collect taxes within their jurisdiction, as well as to apply their revenues, without prejudice to the obligation of rendering accounts and publishing balance sheets within the periods established by law.³⁹

Article 23, Sole Paragraph provides for supplementary laws to establish rules for the cooperation between the Federal Government and the states, the Federal District, and the municipalities, with a view to “aiming at the attainment of balanced development and well-being on a nationwide scope” but to date these laws have yet to be enacted.⁴⁰ Moreover, the Constitution offers no interpretation or guidance on the meaning of ‘matters of local interest.’

The result is a complex constitutional sharing of powers, the contours and boundaries of which now fall to be determined by the FSC and are resolved as a matter of constitutional interpretation; power partition should be interpreted accordingly to a “predominant interest” criterion,⁴¹ to the effect that competency should be assigned to the federative entity which manifests greater proximity with the matter.⁴² This may be clear from the text of the Constitution itself in which case, there will be an absolute presumption when it comes to the holder of the predominant interest.⁴³ Where the Constitution is silent or there is ambiguity, the FSC will decide the issue on a case by case basis, by reference to criteria of proximity and ability to address the matter in question. Court rulings on the issue of ‘predominant interest’ do not preclude action by other federative entities, which retain their constitutional

³⁵ RAN HIRSCHL, *CITY, STATE: CONSTITUTIONALISM AND THE MEGACITY*. New York: Oxford Press, 2020, p. 28.

³⁶ Fernando Luiz Abrucio & Eduardo José Grin. *From Decentralization to Federative Coordination: The Recent Path of Intergovernmental Relations in Brazil*. International Conference on Public Policy. 2015.

³⁷ Articles 1 & 29.

³⁸ Article 23 II. The Union, the states, the Federal District and the municipalities, in common, have the power: (CA 53, 2006; CA 85, 2015)

³⁹ Article 30.

⁴⁰ Art. 23, Single Paragraph.

⁴¹ See ADI 2435, Justice-Rapporteur Carmen Lucia, Editor for the ruling, Gilmar Mendes, ruled on Dec.21, 2020.

⁴² See ADPF 567, Justice-Rapporteur Alexandre de Moraes, ruled on Mar. 1, 2021.

⁴³ See RE 1181244 AgR, Justice-Rapporteur Alexandre de Moraes, ruled on Aug. 23, 2019.

competencies.⁴⁴ This is in line with the recognized constitutional intention to create a non-hierarchical model of co-operative federalism.⁴⁵ The problem is of course that the absence of a definitive constitutional or legislative mechanism for resolving intergovernmental disputes⁴⁶ means that intergovernmental disputes concerning the exercise of shared competencies can result in political standoffs, which, if not resolved, will ultimately have to be resolved by the courts as a matter of constitutional review. In the context of a global pandemic, the complexities of public health competencies and responsibilities were reviewed by the FSC on two occasions in actions of significant constitutional importance as the next section now considers.⁴⁷

C. PUBLIC HEALTH COMPETENCIES IN THE BRAZILIAN FEDERATION: HOW THE FSC DRAWS THE LINE

Brazil's Unified Health System (“Sistema Único de Saúde – SUS) was set up under Article 198 of the 88 Constitution which provides for an integrated regionalized and hierarchical system underpinned by principles of decentralization, full service provision and community participation.⁴⁸ The constitutional provision was developed in Federal Law n° 8080/90, which distributed responsibilities among the federal entities, but clarification regarding boundaries continues to be with the FSC which will generally reinforce the positive duties deriving from the Brazilian constitution. Lack of clarity in the allocation of responsibilities on matters of public health is not, according to FSC jurisprudence, grounds to exempt federal entities from their constitutional duties.⁴⁹

The first set of lawsuits was launched in the early days of the crisis in response to initiatives intended to centralize COVID-19 planning decisions with the federal government —ADI's 6341 and 6343.⁵⁰ Despite a clear awareness of the counter-majoritarian difficulties that generally require unelected judges to exercise restraint,⁵¹ the federal court's ruling directly addressed the issue of the allocation of functions amongst the federal entities. Justice Alexandre de Moraes, concurring, stated:

It is not conceivable that central government aspires to exercise a monopoly over the administrative management of the pandemic affecting more than five thousand municipalities. This is absolutely unreasonable. It is also not

⁴⁴ See RE 586224, Justice Rapporteur Luiz Fux, ruled on Mar. 5, 2015.

⁴⁵ See ADI 3499, Justice-Rapporteur Luiz Fux, ruled on August 30th., 2019; And RE 194.704, Justice-Rapporteur Edson Fachin, ruled on June 29, 2017.

⁴⁶ See ADPF 584, Justice-Rapporteur Alexandre de Moraes, Plenary, ruled on Feb. 21, 2020.

⁴⁷ *Infra*.

⁴⁸ Article 198.

⁴⁹ “Adequate medical treatment for the needy is part of the State's duties, as it is the joint responsibility of the federated entities. The passive pole [standing as defendant] can be composed [recognized to] of any one of them, individually or jointly”. RE 855178 RG, Justice-Rapporteur Luiz Fux, ruled on May 3, 2015.

⁵⁰ See notes 7 and 8 *supra*.

⁵¹ See Luís Roberto Barroso, *Reason Without Vote: The Representative and Majoritarian Function of Constitutional Courts in DEMOCRATIZING CONSTITUTIONAL LAW 71-90* (T. Bustamante & B.G. Fernandes eds. 2016).

conceivable that Municipalities, based on a shared competence established by the Constitution, should become autonomous republics inside Brazil itself, closing their own geographic boundaries, and preventing delivery of essential services. This is not what the Constitution establishes.

The Constitution establishes an allocation of competencies based on cooperation—the so-called cooperative federalism—in relation to what is the predominant local interest.⁵²

Justice Edson Fachin, Justice-Editor for the ruling, added that interpretation of the allocation of competencies required coherence with “the constitutional normative program”—meaning, the final commitments addressed to the federal entities. That argument would lead to the necessary grant of authority to all federal entities – if the core value at stake was public health – in accordance with the predominant interest criterion.

The Court’s core argument is set out in the summary of ADI 6341:

5. It is necessary to read the rules that make up Law 13,979, of 2020, as arising from the Union’s own competence to legislate on epidemiological surveillance, under the terms of the General Law of the SUS, Law 8080, of 1990. The exercise of Union competence at no time diminished the competence of the other entities of the federation in the realization of health services, nor could it- after all, the constitutional guideline is to municipalize these services.⁵³

Justice Edson Fachin conceded that in certain circumstances it could be constitutionally permissible for the Union to preempt concurrent action on the part of other federative entities but this would have to be by federal legislation, which was not the case here.

Therefore, National Congress can—and will do, if it so wishes—regulate, in a harmonized and national form, on an issue or public policy. Nevertheless in the absence of a legislative manifestation, initiated by Congress or by the Chief of the Executive branch, one cannot constrain the remaining federal entities from exercising their competencies in promoting fundamental rights.⁵⁴

The ruling in ADI 6343 shares the same reasoning:

[...]

4. In relation to health and public assistance, the Federal Constitution establishes the existence of a common administrative competence between the Union, States, Federal District and Municipalities (art. 23,

⁵² ADI 6341, Justice-Rapporteur Marco Aurélio, Justice-Editor for the ruling, Edson Fachin, ruled on April 15th, 2020, p. 24.

⁵³ *Id.* at p. 2.

⁵⁴ 5 ADI 6341, Justice-Rapporteur Marco Aurélio, Justice-Editor for the ruling, Edson Fachin, ruled on April 15th, 2020, p. 6.

II and IX, of the CF), as well as provides for concurrent competence between the Union and States/Federal District to legislate on health protection and defense (art. 24, XII, of the CF); allowing Municipalities to supplement federal and state legislation as appropriate, as long as there is local interest (art. 30, II, of the CF); and also prescribing the political-administrative decentralization of the Health System (art. 198, CF, and art. 7 of Law 8.080/1990), with the consequent decentralization of the execution of services, including with regard to sanitary surveillance activities and epidemiological (art. 6, I, of Law 8.080/1990). 5. It is not, therefore, incumbent upon the federal Executive Power to unilaterally reject the decisions of state, district and municipal governments that, in the exercise of their constitutional powers, have adopted or will adopt, within their respective territories, important restrictive measures such as the imposition of social distancing or isolation, quarantine, suspension of teaching activities, restrictions on trade, cultural activities and the movement of people, among other recognized effective mechanisms for reducing the number of infected people and deaths.⁵⁵

The second opportunity for the court to review the intersection of federal, state and municipal relations in Brazil followed President Bolsonaro's refusal to comply with and attempts to veto public health protocols put in place by states and municipalities, in accordance with FSC previous rulings.⁵⁶ ADPF 672,⁵⁷ filed by the Federal Council of the Brazilian Bar Association (OAB) asked the court to grant an injunction determining that the President should comply with the WHO protocol regarding the adoption of social isolation measures and determinations of state governors and mayors related to "economic activities and public gathering rules"; and refrain from interference in the technical work of the Ministry of Health, under the parameters of WHO recommendations.⁵⁸

The injunction was granted on April 9th, 2020, once again by Justice Alexandre de Moraes, and confirmed on October 13th, 2020, by a unanimous full bench. The shared nature of federative entities' responsibilities was again asserted by the Court:

4. The Federal Executive power exercises the role of a central entity in planning and coordinating governmental action related to public health, but cannot unilaterally override the decisions made by the

⁵⁵ ADI 6343, Justice-Rapporteur Alexandre de Moraes, ruled on May 6th, 2020, p. 2.

⁵⁶ President Bolsonaro refused to wear a mask, even in public closed areas and was fined, *Jair Bolsonaro fined for not wearing mask at São Paulo biker rally*, THE GUARDIAN, Jun. 13, 2021; Terrence McCoy & Gabriela Sá Pessoa, *Bolsonaro Worked to Shake Brazil's Faith in Vaccines. But Even His Supporters Are Racing to Get Their Shots*. WASH. POST, Aug. 16, 2021.

⁵⁷ ADPF 672-MC, Justice-Rapporteur Alexandre de Moraes, ruled on Oct. 13, 2020.

⁵⁸ For a useful timeline see D. Ventura, & R. Reis, *An Unprecedented Attack on Human Rights in Brazil: The Timeline of the Federal Government's Strategy to Spread Covid-19*. Offprint. Translation by Luis Misiara, revision by Jameson Martins. *Bulletin Rights in the Pandemic* n. 10, São Paulo, Brazil, CEPEDISA/USP and Conectas Human Rights, Jan 2021, available at: https://www.conectas.org/wp-content/uploads/2021/01/10boletimcovid_english_03.pdf

states, the Federal District and municipal governments, in the exercise of their own constitutional competencies, to adopt within their own geographical boundaries, public health measures authorized in Federal Law 13.979/2020.

The Court however declined to override the discretion of the Executive and order the President to carry out specific administrative measures.⁵⁹

The Court's decision was welcomed not only because it offered an appropriate response to the prevailing political instability, but also because it stressed the relevance of developing mechanisms of cooperative federalism, "not only in the daily operation of public policies but above all in situations of complex intergovernmental problems."⁶⁰ However, the breadth of the powers the Court was prepared to extend to states and municipalities met with surprise in certain quarters;⁶¹ leaving unanswered the question whether the rulings represent a new and expansive jurisprudence of federalism, or whether they should be interpreted narrowly as a specific response to the particular exigencies of the pandemic.

The latest FSC decisions in ADIs 6586⁶² and 6587⁶³ related to mandatory vaccination. Once again the Court confirmed that both states and municipalities have competencies in relation to measures aimed to protect public health:

"IV – The competence of the Ministry of Health to coordinate the National Immunization Program and define the vaccines that are part of the national immunization schedule does not exclude that of the States, the Federal District and the Municipalities to establish prophylactic and therapeutic measures to face the pandemic resulting from the new coronavirus, at a regional or local level, in the exercise of the power-duty to "take care of public health and assistance" that is entrusted to them by art. 23, II, of the Federal Constitution."⁶⁴

It was this ruling that allowed the Ministry of Health to coordinate the inclusion of COVID-19 vaccines in the National Immunization Program, President's Bolsonaro anti-vax position notwithstanding.⁶⁵ As the FSC clearly recognized, in a country with an extensive territory as Brazil, effective delivery of health care

⁵⁹ ADPF 672-MC, Justice-Rapporteur Alexandre de Moraes, ruled on Oct. 13, 2020, p. 10.

⁶⁰ Fernando Luiz Abrucio, et al. *Combate à COVID-19 sob o Federalismo bolsonarista: Um Caso de Descoordenação Intergovernamental* 54(4) *REVISTA DE ADMINISTRAÇÃO PÚBLICA* Aug. 28, 2020. *See also* DA SP NÉRIS, Eduardo Henrique Corrêa & Rodrigo Ribeiro Bedritichuk, *Brazilian Federalism: Facing the COVID-19 Pandemic* 1. in *FEDERALISM AND THE RESPONSE TO COVID-19* 59-65 (2021).

⁶¹ "Historically, STF has struck down state and municipal legislation when it is in conflict with the federal Constitution or national legislation. It is rare, if not impossible, to find an STF decision that invalidates federal legislation for infringing on powers reserved for states or municipalities". *See* Corrêa & Bedritichuk, *supra* note 63, at 62.

⁶² ADI 6586, Justice-Rapporteur Ricardo Lewandowsky, ruled on Dec.17, 2020.

⁶³ ADI 6587, Justice-Rapporteur Ricardo Lewandowsky, ruled on Dec.17, 2020.

⁶⁴ ADI 6586, Justice-Rapporteur Ricardo Lewandowsky, ruled on Dec.17, 2020, p. 2.

⁶⁵ Jean Kirby, *How Brazil Survived Its President's Vaccine Skepticism*, *THE VOX*, Feb 3, 2022, 7:00am EST, <https://www.vox.com/22909351/brazil-vaccines-bolsonaro-covid-19-misinformation>.

provision is not something that can be undertaken without meaningful cooperation on the part of all federative entities.

D. CONCLUDING REFLECTIONS

As the above account demonstrates, the story of COVID-19 management in Brazil has been heavily determined by constitutional design and a pattern of federalism that has sought to divert power away from the centre in favour of localities and local self-determinism. As Professor Hirschl has commented, in Brazil, as elsewhere in the global South, historically entrenched hierarchies are not easily suppressed particularly where constitutional allocations of competencies are not supported by fiscal and budgetary independence.⁶⁶ The Brazilian federal experience has traditionally been one of asymmetric relations, with a clear predominance of the central government secured not only through the broad sphere of legislative competencies, but also through a very centralized fiscal system.⁶⁷ Thus despite the clear attempt of the 1980 constitution to mitigate the grip of central government, the effect of allocating shared competencies to other federative entities has too often been political deadlock to which the solution offered in Brazilian constitutional design, is judicialization—with all that this entails in terms of judicial politicization—and debates concerning democratic deficit—and this is what we see happened in fighting the pandemic.

Despite the coherence in the FSC rulings repeatedly granting States and Municipalities their own competencies it is not clear that the transfer of responsibility for dispute resolution to the Court is a better solution. Stating competencies in a ruling is quite easy—but fighting the pandemic remains a problem that requires cooperation, and not antagonism, between the federative entities. A major public health problem will always be better served through cooperation, and this is a sort of relation that is rarely forged in the Courts.

PART II THE UNITED STATES: GOVERNORS VERSUS LOCAL GOVERNMENTS

In the United States, the Trump administration issued declarations of a public health emergency on January 31, 2020 and a national emergency on March 13, 2020, but the absence of a strong presidential lead placed management of the pandemic at the centre of partisan politics. When for political reasons governors either refused or were slow to act, the frontline of response shifted to the local level. As Georgetown University law professor Sheila R. Foster has observed, “the COVID-19 crisis has shown dramatically why local government, where mayors and health officials are on the frontlines of responding to global health threats like pandemics, is increasingly where effective governance happens in America.”⁶⁸

⁶⁶ Hirschl, *supra* note 3.

⁶⁷ See Márcia Miranda Soares & Pedro Robson Pereira Neiva. *Federalism and Public Resources in Brazil: Federal Discretionary Transfers to States*. 5 (2) BR. POL. SCI. REV. 94-116 (2011).

⁶⁸ Sheila R. Foster, *As Covid-19 Proliferates, Mayors Take Response Lead, Sometimes in Conflicts With Their Governors*, GEORGETOWN LAW, <https://www.law.georgetown.edu>.

The patchwork of gubernatorial and local orders requiring *e.g.* citizens to stay home, and or wear masks in public places, businesses to close and restricting attendance and the conduct of ceremonies at houses of worship, has been said to demonstrate U.S. federalism in action—as David Robertson, author of *Federalism and the Making of America* has recently explained: “Federalism is about doing things differently, and you see it in spades in this crisis”⁶⁹—but most significantly it has exposed the intra-state governmental tensions which constitutional theory struggles to manage. Governors who refused to issue lock-down orders and mask mandates were challenged by local governments attempting to take action to protect the health, safety and welfare of their residents. Governors who did impose lock down measures faced local authority opposition and refusal to cooperate in implementing the restrictions.

This Part now proceeds as follows. In section A we outline briefly the orthodox explanation of the allocation of power between the two layers of government that are recognised by the U.S. federal constitution, focussing specifically on the state police power which gives to the individual states regulatory power and responsibility for ensuring the health and welfare of their citizens.

In Section B we consider intergovernmental disputes generated in the context of COVID-19 management, focussing specifically on those disputes between municipalities and their states which focussed on the allocation of intrastate power, and which actually reached court for adjudication. We notice that, given the constraints of the federal constitution which does not formally recognise a place for municipalities to exercise power, litigation that focuses directly on the state-municipality relationship is deployed primarily as a tactic to force political negotiation with varying degrees of success in the COVID-19 specific situation. In Section C, we position these disputes in the context of narratives of local democracy that aim to recalibrate intrastate relationships in such a way as to protect a zone of local self-governance that is preserved from pre-emptive state power. We conclude with the observation that despite predictions that the age of the city is upon us as Professor Hirschl points out, “cities currently lack the constitutional power to bring their own local interests to the fore.”⁷⁰

A. ALLOCATION OF POWER AND RESPONSIBILITY IN A TWO-TIER CONSTITUTION

Absent a strong presidential lead, management of the pandemic response was largely undertaken by state governors. This should not be surprising. In the U.S. legal system, the federal government has enumerated powers granted by art 1 sec. 8 of the Constitution. The remaining sovereign powers of government (the so-called police-powers) are reserved to the states via the Tenth Amendment. Traditionally, this approach of division of powers has been interpreted to reflect the fact that states had powers before the creation of the Union and that the effect of the federal

edu/salpal/as-covid-19-proliferates-mayors-take-response-lead-sometimes-in-conflicts-with-their-governors/.

⁶⁹ Reported in Alan Greenblatt, *Will State Preemption Leave Cities More Vulnerable?* Governing: The Future of States and Localities, Apr. 3, 2020, <https://www.governing.com/now/Will-State-Preemption-Leave-Cities-More-Vulnerable.html>.

⁷⁰ Hirschl, *supra* note 3, at 49.

Constitution was merely affirmatory: “The constitution gives nothing to the States or the people. Their rights existed before it was formed; and are derived from the nature of sovereignty and the principles of freedom.”⁷¹ The powers reserved to the states are usually referred to as ‘police powers’, a term first used in *Gibbons v. Ogden* by Chief Justice John Marshall who described them as a ‘mass of legislation which embraces everything within the territory of the state’ and specifically included quarantine laws and health laws.⁷²

Although the boundaries of the state ‘police power’ have never been precisely defined, traditionally the state police power is said to embrace health, safety, and general welfare of the public.⁷³ As a legal concept, as opposed to a broad set of powers, as Professor Hodge suggests, there is scope for “constant evolution.”⁷⁴ It is also the case that the vertical separation of powers that characterises governance within the United States will generate inter-governmental disputes concerning overlap of regulatory authority. These disputes at the federal/state interface have required U.S. Supreme Court adjudication that is by now well documented.

In terms of the management of health emergencies, the power divide between states and federal government is a fairly settled area of law. Section 361 of the congressional Public Health Service Act⁷⁵ empowers the federal government to establish restrictions on the entry of certain travellers into the United States, a power which during the 2020 pandemic was exercised in relation to foreign nationals coming from China, Iran, the European Union, the United Kingdom and Brazil.⁷⁶ The federal government also took a lead in coordinating supplies, including the rollout of vaccines across the states and providing federal funding to support assistance and healthcare responses to individuals, families, and business affected by the COVID-19 pandemic.⁷⁷

On the other hand, states are in charge of enforcing isolation and quarantine within their borders and they do so within the remit of the so-called police power. The origins of this power date back to the colonial era; the literature reports that the colony of Virginia passed a vital statistics law to track the health of the community in 1631 and that Massachusetts enacted the first sanitary legislation in America when it passed a maritime quarantine act in 1648 in response to the threat of disease from the West Indies.⁷⁸ Between 1784 and 1797 states passed quarantine laws related to incoming sea vessels and later created local health boards that were in charge of issuing state public health laws and regulations.⁷⁹ The courts have recognized the

⁷¹ *Gibbons v. Ogden*, 22 U.S. 1, 87 (1824).

⁷² *Id.* at 203.

⁷³ See *Barnes v. Glen Theatre*, 501 U.S. 560 (1991) (“the traditional police power of the States is ... to provide for the public health, safety and morals”).

⁷⁴ James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 319 (1998).

⁷⁵ (42 U.S. Code § 264)

⁷⁶ *Travelers Prohibited from Entry to the United States*, Centre for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html> (last visited 07/31/2020).

⁷⁷ H.R. 748, 116th Cong. (2020) a \$2 Trillion stimulus bill (March 2020) and a \$900 billion pandemic relief bill (December 2020).

⁷⁸ James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 325 (1998).

⁷⁹ Maryland (1784), New Hampshire (1789), Virginia (1792), Georgia (1793), Connecticut

authority of states to enact quarantine laws and health laws that relate to matters completely within their territory.⁸⁰ In *Jacobson v. Massachusetts* (1905)⁸¹ Justice Harlan went so far as to confirm that states can compel their citizens to receive a vaccine in the interest of public health and public safety.⁸²

Decisions by a state to impose, relax or remove restrictions on the activities of its citizens are first and foremost political, requiring politicians in conjunction with their advisors to make judgments as to where the public interest best lies. These decisions can and often will, generate challenges, some of which will likely need to be resolved in court. In the context of measures to combat the Covid -19 pandemic, the courts demonstrated a clear reluctance to second guess these decisions. As Chief Justice Roberts explained:

[o]ur Constitution ‘principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect;’ when those officials ‘undertake[.] to act in areas fraught with medical and scientific uncertainties,’ their latitude ‘must be especially broad.’⁸³ ‘Where those broad limits are not exceeded, they should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people.’⁸⁴

In contrast to the federal/ state divide, the allocation of powers between states and municipalities is much less clear. The U.S. Constitution does not mention the powers or even existence of local authorities. Constitutional theory and U.S. Supreme Court jurisprudence recognise them as creations of the state to which they belong with powers conferred and limited by the state constitution and legislative enactments⁸⁵ but as the structure of local government and the nature and extent of delegated powers vary from state to state, generalisations are not always easy to make.

The 2020 COVID-19 pandemic saw intra state conflict between governors and mayors’ provisions on closures, ‘stay at home’ and ‘masking’ orders which directly raised questions concerning the allocation of intra state power. Specifically where local authorities sought to impose local restrictions such as ‘masking’ and ‘stay at home’ orders which were more stringent than those of the state governor, they were challenged on the basis that their authority in these areas must give way to the pre-emptive power of the state.

(1795), and Delaware (1797). See James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 325 (1998).

⁸⁰ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

⁸¹ 197 U.S. 11 (1905).

⁸² *Id.* at 31.

⁸³ *Marshall v. United States*, 414 U.S. 417, 427 (1974).

⁸⁴ *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (May 29, 2020) (internal citations omitted) (Roberts, C.J. concurring).

⁸⁵ Kenneth Vanlandingham, *Municipal Home Rule in the United States*, 10 W.M. LAW REV. 2 (1968) 269-314, 26. See Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

The doctrine of pre-emption accords primacy to state legislative provisions which are either incompatible with local provisions or which demonstrate an intention to occupy a policy field and thereby preclude local authority attempts at regulation. The doctrine mirrors the principles developed by reference to the federal/state government dynamic but its contours at the intra-state level are less well developed. As with the federal jurisprudence, intra-state pre-emption can be express, because the state law clearly and directly prohibits local authority action in a particular area, or implied by means of the judicial doctrines of field and conflict pre-emption both of which depend upon necessary inference from construction of the state law in question. Both express and implied pre-emption may raise the issue of ‘floor’ or ‘ceiling’, i.e., is state pre-emptive legislation a minimum level of regulation below which municipal regulation must not drop, or does it rather set limits to what is regulatorily permissible so that local authorities which seek to put in place more extensive requirements will be pre-empted from doing so. In the context of COVID-19 the latter type of pre-emption proved to be particularly problematic.

As the pandemic swept the United States and state governors took action to contain the virus, much of the country entered into strict lockdowns. By March 31, 2020, the New York Times reported that 316 million people in at least 42 states, three counties, 10 cities, the District of Columbia and Puerto Rico [were] being urged to stay home.⁸⁶ One year on, the “months of trial and error” and the “nationwide patchwork of rules for businesses and residents” that ensued had generated over 997 law suits. Following the roll out of the vaccines and vaccination programmes many of these are now largely mooted but those that remain unresolved are still being tracked and available to view on the Ballotpedia.⁸⁷ ⁸⁸ The law suits raised a spectrum of constitutional, statutory and procedural objections with varying degrees of success and, at least initially, met with a noticeable reluctance on the part of state and federal courts to overturn gubernatorial and local orders.

The federal district court decision in *County of Butler v. Wolf*⁸⁹ striking key aspects of Pennsylvania’s COVID-19 emergency order including stay at home and business closure orders, was an early exception, raising the question of whether other courts would follow suit. Since then, the U.S. Supreme Court has considered the scope of restrictions on the exercise of religion, holding in *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020)⁹⁰ that New York state restrictions on attendance at places of worship were not sufficiently narrowly tailored to satisfy the requirements of strict scrutiny. In *South Bay United Pentecostal Church v. Newsom* the Court granted preliminary injunctive relief against enforcement of Governor Newsom’s prohibition on indoor worship services in California⁹¹ and in *Tandon v. Newsom*, a divided court granted preliminary relief from California’s restrictions

⁸⁶ <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (accessed April 11, 2021).

⁸⁷ [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021#Relevant_litigation](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021#Relevant_litigation), accessed April 11, 2021.

⁸⁸ See [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021#Relevant_litigation](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021#Relevant_litigation)

⁸⁹ *Cnty. of Butler v. Wolf*, No. 2:20-cv-677 (W.D. Pa. Sept. 14, 2020).

⁹⁰ 592 U.S.- (2021).

⁹¹ 590 U.S. (2020).

on “gatherings” as a violation of the free exercise clause to the extent that they prohibited (or severely restricted) at-home religious gatherings—notwithstanding its “clear” *South Bay* instructions that California “must place religious activities on par with the most favored class of comparable secular activities.”⁹² To date however only a handful of cases have raised the issue of the allocation of intra-state authority.

B. INTERGOVERNMENTAL COVID-19 CONFLICTS

By April 2021, at the height of the pandemic, of the fifty states, twenty-five had no state mandated mask requirements.⁹³ In seventeen of these states, local authorities put their own mask mandates in place.⁹⁴ In states such as Arizona and Florida, gubernatorial orders explicitly prohibited local authorities from enacting mask mandates or going beyond federal policies. In the section that now follows we consider city/governor COVID-19 regulation disputes from the point of view of law-as-political manoeuvring. These disputes mostly did not make it through the courthouse door—to date, as far as we are aware, only three of these intergovernmental disputes have actually reached court and only one reached a full hearing with two being withdrawn as moot.

In so far as legal argument was presented in these cases, the issues raised turned upon interpretation of the state constitution, the scope of the Governors’ authority and whether local authority orders conflicted with gubernatorial orders, in which case they would be pre-empted or were rather properly seen as complementary or supplementary in which case they were not. We draw these disputes to attention however because we note in the various press releases, litigation filings and Attorney-General advisories an incipient articulation of a strategic narrative of inherent local democracy or local police power which does not depend upon the grant of state authority and is protected from its pre-emptive power.

In *City of Huntington Beach v. Newsom*, the City and others challenged a Directive of California Governor Newsom ordering the city and local governments in Orange County to close beaches operated by them on the grounds that the Directive “infringe[s] on the constitutional powers vested in local communities.”⁹⁵ The application for a preliminary injunction was refused on the grounds that the

⁹² 593 U. S. (2021).

⁹³ AL, AK, AR, AZ, FL, GE, ID, IN, IA, KS, LA, MS, MO, MT, NE, NH, ND, OK, SC, SD, TN, TX, UT, WI, WY.

⁹⁴ AL: Birmingham, Montgomery; AK: Anchorage & Juneau; AR: Fayetteville, Little Rock; FL: several cities and large counties including Miami, Dade, Palm Beach, Hillsborough (including Tampa); GA: Atlanta & ors; ID: Boise; IA: Indianapolis; IA: Des Moines, Cedar Rapids, Iowa City; MS: Kansas City, St Louis, Springfield, Columbia, & several other cities & counties; MT: some counties including Gallatin, Missoula, Lewis & Clark; NE: Lincoln, Omaha; ND: several cities and towns including Nasua & Concord; ND: most of ND’s largest cities including Fargo, Bismarck & Minot; OK: local mask mandates in the state’s largest cities – Oklahoma City & Tulsa ended on April 30 and May 1 respectively; SC: numerous counties including Charleston & Columbia; UT: Salt Lake City; WI several large jurisdictions including the cities of Milwaukee, Racine, and Kenosha and Dane County (which includes Madison).

⁹⁵ No. 30/2020-01139512-CU-MC-CJC, Cal. Super. Ct. (Orange Cty.) 05/15/2020. The authors thank Bonnie M. Ross, Esq. of Messner Reeves LLP for her assistance with obtaining this.

Governor had by then withdrawn the directive and the applicants had not shown that the order was likely to be repeated, rendering the application moot.⁹⁶

In Georgia, it was the Governor who brought suit against the city of Atlanta for issuing local mask mandates which exceeded state Executive Order restrictions. The dispute started in April 2020 when, following the attempt of local authorities to issue local lockdowns, Governor Kemp signed a shelter-in-place order, shutting down restaurant dining rooms, barbershops, bars and gyms.⁹⁷ The Executive Order contained an explicit pre-emptive clause:

The powers of counties and cities [...] are hereby suspended to the extent of suspending enforcement of any local ordinance or order adopted or issued since March, 1 2020, with the stated purpose [of] combatting the spread of Coronavirus or COVID-19 that in any way conflicts, varies or differ from the terms of this order. Enforcement of all such ordinances and orders is hereby suspended and no county or municipality shall adopt any similar ordinance or order while this Order is in effect, except for such ordinances or orders as are designed to enforce compliance with this Order.⁹⁸

The Order was strongly criticised by local mayors for superseding “their efforts to curb the virus’s spread”⁹⁹ and creating confusion around “which businesses could stay open and which had to close.”¹⁰⁰ Tension crystallised in summer 2020 when some local authorities, unhappy with the reopening plans and the state management of the lockdown, started to issue local mask mandates.¹⁰¹ On July 8th Atlanta Mayor Keisha Lance Bottoms issued an executive order restricting restaurants to take out and curb side pick-up services, and requiring people to wear masks, shelter-in-place at their homes and only leave for essential tasks. The order went beyond state restrictions which by this time had allowed restaurants to reopen with restrictions and did not require the use of masks. Governor Kemp filed suit alleging Mayor Bottoms had “exceeded her authority by issuing executive orders which were more restrictive than his Executive Orders related to the Public Health Emergency.”¹⁰²

In the event the Governor backed down, dropped the lawsuit and issued a new order that allowed local authorities to issue a “Local Option Face Covering Requirement” for public places and on government property but restricted them from issuing mask mandates on private property. Clearly his reasons for doing so were political but the effect was that the legal arguments of the City were unresolved.

⁹⁶ *Id.*

⁹⁷ 2019 GA EO 477 (April 02, 2020).

⁹⁸ 2019 GA EO 477 (April 02, 2020).

⁹⁹ Rick Rojas, *In Georgia, Shelter-in-Place Order Closes Businesses and Reopens Beaches*, N.Y. TIMES, April 4, 2020, <https://www.nytimes.com/2020/04/04/us/coronavirus-georgia-beaches.html>.

¹⁰⁰ Wright Gazaway, *Savannah Mayor Frustrated amid Georgia’s New Shelter-in-Place Order*, WTOC, April 3, 2020 <https://www.wtoc.com/2020/04/03/savannah-mayor-frustrated-amid-georgias-new-shelter-in-place-order/> (last accessed Dec. 12th, 2020).

¹⁰¹ Namely the cities of Atlanta, Savannah and Athens. See Madeleine Carlisle, *Georgia Gov. Brian Kemp Sued to Block Atlanta’s Face Mask Ordinance. Here’s What to Know*, July 18, 2020, <https://time.com/5868613/georgia-governor-brian-kemp-face-mask-atlanta-keisha-lance-bottoms/>.

¹⁰² *Kemp v. Bottoms et al.*, 2020 WL 4036827 (Ga. Super.)

Of interest is that lawyers for the city of Atlanta put forward legal arguments that could potentially be used in future pre-emption litigation. They argued that the city has the right to take action to protect the public, and its mask mandate was not inconsistent with or pre-empted by the governor's order. They further argued that the lawsuit was barred by sovereign immunity, according to which state and local governments cannot be sued without their consent.¹⁰³ A more targeted discussion of the issue of pre-emption was undertaken in an amicus brief filed by the Georgia Municipal Association which relied on a separation of powers arguments and argued that only the legislature -and not the Governor- had the power to issue pre-emption orders because "preemption is based on legislative act and intent, not through an executive usurpation of that legislature".¹⁰⁴

In Missouri, ongoing COVID-19 restrictions in St. Louis County led State Attorney-General Eric Schmitt to file suit in St. Louis County Circuit Court, arguing that St. Louis County's COVID-19 mitigation measures were "among the most aggressive and restrictive imposed by any county in the State of Missouri." ¹⁰⁵ St. Louis County and St. Louis rescinded most of the challenged restrictions on May 14, 2021, following new guidance for vaccinated individuals issued by the U.S. Centers for Disease Control.

Two months later on July 26, 2021, General Schmitt again filed suit against the city and county of St. Louis for re-imposing a mask mandate requiring those aged five and older to wear a mask in indoor public places regardless of vaccination status. In his petition to the court, Schmitt described the new mask mandate as "a continuation of a series of arbitrary, capricious, unlawful, and unconstitutional COVID-19 related restrictions" and argued that "St. Louis County and St. Louis City seek expanded government power that has failed to protect Missouri citizens living within their boundaries in the past and is not based on sound facts and data." On July 27, 2021, the St. Louis County Council voted 5-2 to terminate the mandate. However, following that vote, St. Louis County Executive Dr. Sam Page issued a statement maintaining that the mandate remained in effect, pending resolution of Schmitt's lawsuit. Schmitt asked the St. Louis County Circuit Court for a temporary restraining order and preliminary injunction to block enforcement of the mandate. On July 30, 2021, the defendants (including Page and other St. Louis county and city officials) filed a notice of removal to transfer proceedings from state court to the U.S. District Court for the Eastern District of Missouri. On August 1, 2021, U.S. District Court Judge Stephen Clark, ruled that state law issues predominated in the case, declined jurisdiction, and remanded the matter back to state court, writing, "The fate of the mask mandates under Missouri law belongs in the Missouri state courts."¹⁰⁶

¹⁰³ Kate Brumback & Jeff Amy, *Georgia Governor Backs out of Hearing on Atlanta Mask Order*, AP NEWS, <https://apnews.com/article/virus-outbreak-georgia-health-lawsuits-keisha-lance-bottoms-0621ded2ee46ee4ace84cffbda178ab3>.

¹⁰⁴ Brief for the City of Atlanta as Amicus Curiae, GMA <https://www.gacities.com/GeorgiaCitiesSite/media/PDF/GMA-Amicus-Brief-Governor-Kemp-v-the-Mayor-and-City-Council-of-the-city-of-Atlanta.pdf>.

¹⁰⁵ Missouri *ex rel.* Schmitt v. Page, Petition, *St. Louis County Circuit Court*, May 11, 2021.

¹⁰⁶ Missouri *ex rel.* Schmitt v. Page, Case: 4:21-cv-00948-SRC Memorandum & Order, Filed: 08/01/21 E.D. Mo. (E. Div.) <https://www.moed.uscourts.gov/sites/moed/files/documents/news/SchmittvPage.pdf>.

In November 2021, Cole County Circuit Judge Daniel Green ruled that the Missouri law which allowed state health officials or local health departments to “create and enforce orders” to limit the spread of disease law violated the state’s constitution, which gives separate powers to different branches of government, and that elected officials should be the ones to issue such mandates.¹⁰⁷ Green wrote in his ruling that local health officials in Missouri “have grown accustomed to issuing edicts and coercing compliance. It is far past time for this unconstitutional conduct to stop.”¹⁰⁸ Shortly after the ruling St Louis County rescinded its public mask mandate.

Similar tussles took place in Texas where Attorney-General Ken Paxton challenged Travis County and Austin New Year’s Eve restrictions which sought to limit restaurants to take-out only over the holiday weekend. In its unsigned order, the court directed the Third Court of Appeals to block enforcement of the restrictions “pending final resolution of the appeal.” In his initial complaint in the Travis County District Court, Paxton argued that the local orders conflicted with Governor Greg Abbott’s (R) Executive Order GA-32,¹⁰⁹ which both allowed restaurants and bars to operate at reduced capacity and prohibited “any conflicting order issued by local officials in response to the COVID-19 disaster.” The trial court disagreed, and the Third Court of Appeals initially rejected Paxton’s appeal. Following the Texas Supreme Court’s ruling, Paxton thanked the court “for upholding the rule of law,” saying that the court “was right to end these oppressive, illegal city and county declarations.” Travis County Judge Andy Brown said he was disappointed by the decision “as it limits our ability to slow the spread of COVID-19 in our community.” The restrictions expired at 6:00 a.m. on January 3, 2021.

The cases that we have discussed above represent disputes over the desirability or otherwise of COVID-19 restrictions that actually made it into court. They are not the only instances of this type of intergovernmental dispute. In Florida, Governor Ron DeSantis initially declined to issue a state-wide lockdown and left it to local jurisdictions to decide on restrictions for their own communities. However, on April 1, 2020 he issued a stay-at-home order directing Floridians to stay home except for essential trips.¹¹⁰ The order was expressed to “supersede any conflicting official action or order issued by local officials in response to COVID-19 but only to the extent that such action or order allows essential services or essential activities prohibited by this Executive Order.”¹¹¹ By this time, a number of local authorities had already issued orders for beach closures and restrictions on numbers attending religious services, so that the relationship between these and the Governor’s order was unclear.¹¹² Governor DeSantis attempted to clarify the meaning of the amended Order during a Press Conference and stated:

¹⁰⁷ <https://www.stlpr.org/coronavirus/2021-11-23/missouri-judge-rules-local-mask-mandates-other-coronavirus-orders-unconstitutional>.

¹⁰⁸ <https://www.usnews.com/news/best-states/missouri/articles/2021-11-23/judge-local-health-orders-tied-to-covid-19-are-illegal>.

¹⁰⁹ Executive Order GA-32, https://gov.texas.gov/uploads/files/press/EO-GA-32_continued_response_to_COVID-19_IMAGE_10-07-2020.pdf.

¹¹⁰ Executive Order 20-91 (Apr. 1, 2020).

¹¹¹ Section 4, Executive Order 20-91 (Apr. 1st, 2020).

¹¹² Janelle Irwin Taylor, *Megachurches Are Exempt from Safe-at-Home Order Following Ron DeSantis’ clarification*, FLAPOL, <https://floridapolitics.com/archives/326446-megachurches-will-be-exempt-from-safer-at-home-order-following-ron-desantis-clarification>.

We have the baseline. If folks want to do things more, then they can do more in certain situations. We want to work with the local folks. I think each region in Florida is very distinct, and some of these things may need to be approached a little bit differently.”¹¹³

The following day, April 2, DeSantis issued a revised order which omitted the second half of the sentence and left only the wording: “This Order shall supersede any conflicting official action or order issued by local officials in response to COVID-19”.¹¹⁴

The revision failed to clarify the relationship between governor and local authority regulations but in a later order (Order 20-123) enacted on May, 14th 2020 authorising Phase I of the reopening of the state the language of pre-emption appears. This order clearly set out to prevent local authorities from prohibiting the hosting of sport events and games:

Professional sports may operate in the State of Florida and venues may host training, competitions, events and games. This provision shall preempt any local rule prohibiting a professional sports team conducting, or the operators of the venue from hosting, those sports activities at facilities in the State.¹¹⁵

In Iowa, following the governor’s refusal to issue a state-wide mandate,¹¹⁶ during summer 2020 some local authorities attempted to issue mask mandates.¹¹⁷ In Muscatine, these attempts had limited effect due to the difficulty of enforcing such requirements and the conflicting views of the mayor, the county attorney and the legislature. County attorney James Barry declared that he would not prosecute infractions, and the City Council voted to prohibit the use of city staff time or funds to pursue enforcement of the order.¹¹⁸ In Iowa City and Johnson County, however, local enforcement collaborated with the mayor and the mask mandate was extended to November, 13th.

To date, there has been no legal action by the Governor or Attorney General against Muscatine or Iowa City for their face covering requirements. The legal issues around pre-emption of local action are therefore unsettled in Iowa. However,

¹¹³ Renzo Downey, Safe-At-Home Order Confusion Continues in Preemption Issue, FLORIDA POLITICS available at <https://floridapolitics.com/archives/326513-safe-at-home-order-confusion-continues-in-preemption-issue>, April 2, 2020.

¹¹⁴ Executive Order 20-92 (Apr. 1st, 2020).

¹¹⁵ Executive Order 20-123 (May 14th, 2020).

¹¹⁶ See *Local Control Dispute Brewing over Iowa Mask Mandates*, Fox42, <https://fox42kptm.com/news/local/local-control-dispute-brewing-over-iowa-mask-mandates>. Governor Kim Reynolds then issued a broad mask requirement for indoor public spaces on Nov. 16, 2020. See Public Health Disaster Proclamation 11/16/2020 available at <https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.11.16.pdf>.

¹¹⁷ See *Iowa City Mayor Mandates Wearing Masks in Public, Defying Governor; Authority to Do So in Dispute*, Iowa City Press Citizens, <https://eu.press-citizen.com/story/news/local/2020/07/21/iowa-city-mayor-bruce-teague-order-residents-wear-face-coverings-public-governor-kim-reynolds/5477707002/>.

¹¹⁸ *Iowa City mayor mandates wearing masks in public*, *supra* note 117.

as in other states, the impression is that both the state and the local authorities are preparing for a future court battle. The Governor has asserted that Governor's emergency management authority occupies the field for purposes of pre-emption and therefore local governments are not authorized to implement face mask mandates or other local regulations. Cities argued that they can issue local mandates under their Home Rule authority which authorises them to determine their local affairs and issue orders not inconsistent with the laws of the state.¹¹⁹ From a legislative point of view, the Iowa Constitution grants Home Rule power to municipalities in Art. III sec. 8,¹²⁰ and the Iowa code specifies that "An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law."¹²¹ The issue that a court would need to address in a potential lawsuit is whether the mask requirement is "irreconcilable" with state law and with the Governor's emergency management action. The matter was further raised by Sen. Zach Wahls who asked for an opinion of the Iowa Attorney General Tom Miller's office. The Office issued a non-conclusive letter in which it argued that, if not pre-empted, local regulations could "likely be under the jurisdiction of local boards of health".¹²² The letter also compared the enactment of mask orders with the power of local officials to issue shelter in place orders. In that case, the Attorney General concluded that local authorities could issue shelter in place orders only if such a power was delegated by the state under Iowa Code Sec. 29C.6 (8) which allows the Governor to delegate and sub-delegate any administrative authority under the Emergency Management Chapter.¹²³

The situation in South Carolina is similar. Following the passage of local shelter in place orders by the city of Columbia and Charleston, Attorney General Alan Wilson issued a legal opinion in March 2020.¹²⁴ The opinion concluded that local authorities cannot pass shelter in place orders because such authority falls under emergency powers delegated to the Governor by the General Assembly and that such powers pre-empt those of counties and municipalities.¹²⁵ The argument relied on a previous opinion dated September 5, 1980 related to compulsory

¹¹⁹ See Letter of the Iowa Department of Justice to Sen. Zach Wahls, p. 1 <https://www.cityofdubuque.org/DocumentCenter/View/46486/City-of-Dubuque-Mask-Mandate-Memo-8520>.

¹²⁰ Article III, Section 38A of the Iowa Constitution, "Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly."

¹²¹ Iowa Code §§ 364.2(2) and (3). Section 2 "A city may exercise its general powers subject only to limitations expressly imposed by a state or city law." Section 3. An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law.

¹²² See EXHIBIT A, Letter of the Iowa Department of Justice to Sen. Zach Wahls, *supra* note 122, at 5.

¹²³ *Id.* Legal Memo from the Attorney's General Office, p. 9 <https://www.cityofdubuque.org/DocumentCenter/View/46486/City-of-Dubuque-Mask-Mandate-Memo-8520>.

¹²⁴ Office of the Attorney General, State of South Carolina, *Updated opinion with additional citations concerning the extraordinary powers of the Governor during a state of emergency*. March 28, 2020. <http://www.scag.gov/archives/40491#ixzz6ifii4W5f>

¹²⁵ S.C. Code Ann. § 25-1-440 (a) (2018). "The Governor, when an emergency has been declared, as the elected Chief Executive of the State, is responsible for the safety, security, and welfare of the State and is empowered with the following additional authority to adequately discharge this responsibility".

evacuations by municipalities in case of a real or threatened emergency or disaster-related situation. The conclusion there was that “there is no similar inherent ‘police power’ in lesser political subdivisions such as counties and municipalities, as each derives its authority from the sovereign.”¹²⁶ Likewise, Attorney General Alan Wilson argued in March 2020: “The corollary to this is that while local governments retain their Home Rule powers during a state of emergency, they do not have extraordinary emergency powers. They cannot exercise the emergency powers delegated to the Governor by the General Assembly.”¹²⁷ Despite this assertion, however, the opinion left the door open for potential litigation and added that a municipal ordinance is a legislative enactment and is presumed to be constitutional unless and until set aside by a court of competent jurisdiction.¹²⁸

On the other side of the dispute, Mayor of Columbia Stephen K. Benjamin pushed back and contended that the order was within the city’s authority because the Governor had not acted and had therefore not pre-empted the field.¹²⁹

The potential legal issue for a court would therefore be to establish the extent to which such local orders can have validity in absence of state action. This remains an unsettled area since the Governor of South Carolina Henry McMaster eventually issued a stay at home order on Apr. 6th 2020 that made the legal dispute redundant.

In California on the other hand Governor Newsome issued an Executive Order rolling back the applicability of state pre-emption on the basis that local authorities, based on their particular needs, may [...] determine that additional measures to promote housing security and stability are necessary to protect public health or to mitigate the economic effects of COVID-19¹³⁰ or may determine that ... promoting stability amongst commercial tenancies is also conducive to public health such as by allowing commercial establishments to decide whether and how to remain open based on public health concerns rather than economic pressures, or to mitigate the economic effects of COVID-19: “ any provision of state law that would preempt or otherwise restrict a local government’s exercise of its police power to impose substantive limitations on residential or commercial evictions [...] is hereby suspended to the extent that it would preempt or otherwise restrict such exercise

C. NARRATIVES OF LOCAL DEMOCRACY: DILLON’S RULE, HOME RULE AND THE SCOPE OF MUNICIPAL AUTHORITY

As Professor Bluestein points out, “the scope and structure of delegated powers of each state are often characterized as either “home rule” or “Dillon’s rule.”¹³¹ The former, sometimes known as the Cooley Doctrine after Michigan Supreme

¹²⁶ 1980 S.C. Op. Att’y Gen. 142 (1980).

¹²⁷ 2020 WL 2044370, at *2 (S.C.A.G. Mar. 29, 2020).

¹²⁸ *Id.* at *3 citing *Whaley v. Dorchester County Zoning Bd. of Appeals*, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999) and *Peoples Program for Endangered Species v. Sexton*, 323 S.C. 526, 532, 476 S.E.2d 477, 481 (1996).

¹²⁹ *Columbia Stay-at-Home Ordinance to Go Into Effect Sunday, Despite Warning From Attorney General*, WIS NEWS 10, <https://www.wistv.com/2020/03/27/columbia-stay-at-home-ordinance-go-into-effect-sunday-despite-warning-attorney-general/>.

¹³⁰ Executive Order N28-20, https://www.nclc.org/images/pdf/special_projects/covid-19/CA-3.16.20-Executive-Order.pdf.

¹³¹ Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule*, 84 N.C.L. REV. 1983, 1985 (2006). See also: Jesse J. Richardson et al, *infra* 30.

Court Judge Thomas M. Cooley, yields a theory of an inherent municipal right to self-determination that the state cannot take away.¹³² By contrast Dillon's rule which derives from much more restrictive narrative of the state/ local authority relationship found in the work of John Forest Dillon, chief justice of the Iowa Supreme Court,¹³³ offers no such right but sees local governments merely as political subdivisions of the State to which they belong and dependent upon them for their existence and their powers: "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control."¹³⁴

In this formulation, there can be no equivalent of an inherent police power with consequences for the role of the courts as the Chief Justice later explained:

A municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words (from the state); second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation-not simply convenient, but indispensable; and fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation.¹³⁵

This explanation of state pre-eminence over local governments was recognised and adopted by the U.S. Supreme Court in *Barnes v. District of Columbia* (1876)¹³⁶ and again in the case of *Hunter v. Pittsburgh* (1907).¹³⁷

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. [...] The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. [...]. The state [...], at its pleasure, may modify or withdraw all such powers, [and even] repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. [...]. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.¹³⁸

¹³² See *People v. Hurlbut*, 24 Mich. 44, 95 (1871) (Cooley, J., concurring).

¹³³ See 1 John Forrest Dillon, *Commentaries on the Law of Municipal Corporations* § 98, at 154-56 (5th ed. 1911).

¹³⁴ *Clinton v. Cedar Rapids & Missouri River Railroad*, 24 Iowa 455 (1868). See also his work, *THE LAW ON MUNICIPAL CORPORATIONS* (1872).

¹³⁵ *Merriam v. Moody's Executors*, 25 Iowa 163, 170 (1868) (Dillon, C.J.).

¹³⁶ *Barnes v. District of Columbia*, 91 U.S. 540, 544-45 (1876).

¹³⁷ *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

¹³⁸ *Id.* at 178-79 (1907).

The consequence then is that local government authority must be construed narrowly.¹³⁹ It must, however, be borne in mind that the rule itself does not describe the structure and powers of municipalities in a given state but is in effect a default rule of construction; in the absence of provisions in state constitutions or legislation that support a more generous interpretation, “[a]ny fair, reasonable doubt concerning the existence of power [falls to be] resolved . . . against the corporation.”¹⁴⁰ The same rule was to apply to counties which are to be regarded as possessing little or no lawmaking authority, being nothing more than administrative arms of the state government.

Home rule, on the other hand, “refers to a broad delegation of authority by the state over matters of local concern.”¹⁴¹ It speaks to the desire on the part of local authorities to exercise a measure of autonomy and democratic control within their localities and is the corollary of the *Cedar Rapids/Hunter v. Pittsburgh* analysis. If the state can destroy it can also create. The movement to extend the powers of municipalities vis à vis those of the state began during the Progressive movement in America at the end of the 19th century. Progressives concerned about “legislative capture” or, to use Samuel Isaacharoff’s term, “clientelism,”¹⁴² sought to cabin the ability of state legislatures to buy political support in exchange for special privilege legislation and pushed for the amendment of state constitutions and the enactment of state laws to increase the power of local governments and decrease the ability of state legislatures to exercise power over their functioning.¹⁴³

These early home-rule attempts granted municipalities only limited substantive lawmaking powers restricted in the main to matters of “local” concern. This meant that, should the exercise of these powers be challenged, the role of the courts was limited to ascertaining the “local” character of the regulation in question. A city acting within the sphere of “local” concern, would enjoy freedom from state interference.¹⁴⁴ The 1950s and 1960s, however, saw a second wave of proposals aimed at extending the distribution of power to local authorities by delegating to them aspects of the state ‘police power.’ In 1953, the American Municipal Association published a set of Model Constitutional Provisions for Municipal Home Rule which starting from the proposition that states should delegate the full range of state legislative authority to their general purpose local governments subject always to overriding or preemptive state general law.¹⁴⁵ The effect was to

¹³⁹ See Frank Vram Zerunyan, *The Evolution of the Municipal Corporation and the Innovations of Local Governance in California to Preserve Home Rule and Local Control*, 44 FORD URB. L.J. 220, 217 (2017); Bluestein, *supra* note 16, at 1985.

¹⁴⁰ See Dillon, *supra* note 17, at 93 (2d ed. 1873) (“[Municipalities] possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them....”).

¹⁴¹ *Id.*

¹⁴² *i.e.* the ability to buy public goods in exchange for political support. See Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010); Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEVELAND STATE L. REV. 719, (2012).

¹⁴³ See DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL, JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK, CQ ix (2001) (describing the home-rule movement of the late nineteenth and early twentieth as a pro-democratic effort to increase local autonomy).

¹⁴⁴ Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124 (2007).

¹⁴⁵ Mun. Ass’n, Model Constitutional Provisions for Municipal Home Rule 6 (1953).

launch a wave of reform across the country but has left a ‘varied landscape’¹⁴⁶ of home rule in which states have adapted and modified the two main historical models to produce individual models of delegated authority. All states however retain overriding authority, with state courts the ultimate arbiter of the meaning of the boundaries of delegated and reserved powers.¹⁴⁷

Most recently, the National League of Cities (NCL) launched a new initiative designed to recalibrate the state-local relationship to reflect the changing economic and political significance of the city in the twenty-first century.¹⁴⁸ It proposes a set of interrelated “guiding principles” to recognize the values of local democracy: state home rule should i) reinforce the breadth of authority local governments need to solve the range of challenges they face; ii) advance the critical value of local fiscal authority, iii) ensure that states have sufficiently strong reason to displace local authority and iv) respect the central importance of local democracy. To reinforce and institutionalise these principles, it proposes as a starting point a model constitutional home rule article that states can tailor to suit their own local government arrangements and value choices,¹⁴⁹ subject always to an overriding aim “to articulate and provide means for enacting a state and local legal relationship on the right general grounds, acknowledging that variation across and within states is not only inevitable, but entirely appropriate.”¹⁵⁰

The challenge however, as NCL points out, is not new and the “task of reconciling new law with existing statutes and precedent is not unique to home rule.”¹⁵¹ That may be so but, as the Report notes and NCL has documented, in a climate of ‘culture wars’ where states and their cities and other local governments find themselves at odds, a constitutional jurisprudence of state overweening authority continues to represent the dominant narrative. However as the significance of the place of the modern city as a service and amenity provider with a role that is central to the lives of many, if not most of the population, continues to expand, it is a narrative that looks increasingly outdated. As we observed earlier Professor Hirschl is not immediately optimistic.¹⁵² On the other hand, as he himself recognises: “the 21st century will not be dominated by America or China, Brazil or India, but by the city... the age of the nation-state is over. The new urban era has begun.”¹⁵³ As a passionate advocate of local government autonomy has argued: “A modern jurisprudence recognizing a right of local, community self-government will only emerge as more municipal communities enact local laws securing and exercising that right.”¹⁵⁴ The pandemic is not the only context for local authority muscle-flexing. A detailed overview is outside the scope of this article but as cities attempt to extend their regulatory ambit in relation to such contentious matters

¹⁴⁶ Nat’l League of Cities, *Home Rule for the Twenty-First Century* 12 (2020).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 24-29.

¹⁵⁰ *Id.* at 31.

¹⁵¹ *Id.* at 32.

¹⁵² Hirschl, *supra* note 3.

¹⁵³ Hirschl, citing Parag Khanna, *Beyond City Limits*, 181 FOREIGN POLICY 120, 122 (Sept/Oct 2010).

¹⁵⁴ Thomas Linzey, *A Phoenix From the Ashes: Recognizing a Constitutional Right of Local Community Self-Government in the Name of Environmental Sustainability*, 8 ARIZ. J. ENVTL. L. & POL’Y 1 59 (2017).

as gun control, environmental regulation and sanctuary cities¹⁵⁵ the impetus for independent local democracy will surely grow.

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